Supreme Court, U.S.
FILED

(1)

No. 97-615 OCT - 7 1997

OFFICE OF THE CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1997

---

TRUSERV CORPORATION, PETITIONER

*v.*

THE PEOPLE OF THE STATE OF CALIFORNIA, EX REL. DANIEL G. LUNGREN, ATTORNEY GENERAL, AND AS YOU SOW, RESPONDENTS

---

**Petition for a Writ of Certiorari to the California Court of Appeal, First Appellate District**

---

## PETITION FOR A WRIT OF CERTIORARI

---

PAUL D. MCGRADY, JR.
*TruServ Corporation*
*8600 West Bryn Mawr Ave.*
*Chicago, IL 60631*
*(773) 695-5451*

JEFFREY B. MARGULIES
*Haight, Brown & Bonesteel L.L.P.*
*1620 26th Street*
*Suite 4000 North*
*Santa Monica, CA 90404*
*(310) 449-6000*

KENNETH S. GELLER
ROY T. ENGLERT, JR.
ALAN E. UNTEREINER*
*Mayer, Brown & Platt*
*2000 Pennsylvania Ave., N.W.*
*Washington, D.C. 20006*
*(202) 463-2000*

**Counsel of Record*

93 pp

## QUESTION PRESENTED

The Federal Hazardous Substances Act (FHSA), 15 U.S.C. § 1261 note, provides that, "if a hazardous substance or its packaging is subject to a cautionary labeling requirement" imposed under the FHSA that is "designed to protect against a risk of illness or injury associated with the substance," then "no State or political subdivision may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical" to the federal requirement.

California's Proposition 65 requires businesses to provide "clear and reasonable warning" to individuals who are exposed to certain hazardous substances.

The question presented is whether the FHSA preempts an enforcement action pursuant to Proposition 65 for civil penalties and injunctive relief, which is based on a business's failure to provide warnings that are not identical to the warnings and other cautionary statements required under the FHSA for the same substance.

## RULE 14.1(b) AND 29.6 STATEMENT

Petitioner TruServ Corporation, formerly known as Cotter & Company, changed its name on July 1, 1997, when it acquired Servistar Coast to Coast Corporation. TruServ has no parent company, and its only nonwholly owned subsidiary is Cotter Canada Hardware and Variety Cooperative, Inc.

## TABLE OF CONTENTS

Page

QUESTION PRESENTED . . . . . i

RULE 14.1 (b) AND 29.6 STATEMENT . . . . . ii

TABLE OF AUTHORITIES . . . . . v

OPINIONS BELOW . . . . . 1

JURISDICTION . . . . . 1

STATUTES AND REGULATIONS INVOLVED . . . . . 1

STATEMENT . . . . . 1

A. The Statutory And Regulatory Framework . . . . . 2

1. The Federal Hazardous Substances Act And The Federal Toluene Regulation . . . . . 2

2. Proposition 65 . . . . . 3

B. The Proceedings Below. . . . . 4

1. The Trial Proceedings . . . . . 4

2. The Court Of Appeal's Decision . . . . . 5

REASONS FOR GRANTING THE PETITION . . . . . 9

I. THE DECISION BELOW CONFLICTS IN MULTIPLE RESPECTS WITH THE DECISIONS OF OTHER COURTS . . . . . 9

A. Courts Are Deeply Divided Over Whether FHSA And Other Federal Statutes That Expressly Preempt State "Labeling" Requirements Nevertheless Permit States To Require Warnings Outside The Product "Label" . . . . . 9

**TABLE OF CONTENTS — Continued**

**Page**

B. The Court Of Appeal's Conclusions That FHSA And FIFRA Preemption Are Not Coextensive, And That Preemption Cases Involving Common Law Claims Are Immaterial To Enforcement Actions, Conflict With The Decisions Of Other Courts . . . 14

C. The Decision Below Conflicts With Those Of Other Courts Concerning The Applicability Of *Medtronic*'s "General/Specific" Distinction Outside Of The Context Of Preemption Under The Medical Device Amendments . . . . . 16

II. THE ISSUES PRESENTED ARE RECURRING AND OF ENORMOUS PUBLIC IMPORTANCE . . . . . 21

III. THE COURT OF APPEAL'S DECISION IS MANIFESTLY INCORRECT . . . . . 25

CONCLUSION . . . . . 31

## TABLE OF AUTHORITIES

Page

**Cases:**

*Ackles* v. *Luttrell*, 561 N.W.2d 573 (Neb.), pet. for cert. filed, 66 U.S.L.W. 3137 (Aug. 6, 1997) (No. 97-226) . . . . . 17

*Arkansas-Platte & Gulf Partnership* v. *Dow Chemical Co.*, 506 U.S. 910 (1992) . . . . . 19

*Arkansas-Platte & Gulf Partnership* v. *Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir.), cert. denied, 510 U.S. 813 (1993) . . . . . 11

*Askenazi* v. *Hymil Manufacturing Co.*, 648 N.Y.S.2d 895 (N.Y. Sup. Ct. 1996) . . . . . 18

*Auto Equity Sales, Inc.* v. *Superior Court of Santa Clara County*, 369 P.2d 937 (Cal. 1962) . . . . . 24

*Baldwin* v. *Alabama*, 472 U.S. 372 (1985) . . . . . 14

*Beyrle* v. *Finneron*, 645 N.Y.S.2d 192 (N.Y. App. Div. 1996) . . . . . 11

*Bice* v. *Leslie's Poolmart*, 39 F.3d 887 (8th Cir. 1994) . . . . . 11

*Brand* v. *Mazda Motor Corp.*, 1997 WL 109976 (D. Kan. Feb. 12, 1997) . . . . . 18

*Burch* v. *Amsterdam*, 366 A.2d 1079 (D.C. 1976) . . . . . 21

*Burke* v. *Dow Chemical Co.*, 797 F. Supp. 1128 (E.D.N.Y. 1992) . . . . . 12, 13

*Busch* v. *Graphic Color Corp.*, 662 N.E.2d 397 (Ill.), cert. denied, 117 S.Ct. 55 (1996) . . . . . *passim*

*Canty* v. *Ever-Last Supply Co.*, 685 A.2d 1365 (N.J. Super. Ct. 1996) . . . . . 11

## TABLE OF AUTHORITIES — Continued

Page

*Chemical Specialties Manufacturers Ass'n* v. *Allenby*, 958 F.2d 941 (9th Cir.), cert. denied, 506 U.S. 825 (1992) . . . . . *passim*

*Chemical Specialties Manufacturers. Ass'n* v. *Clark*, 482 F.2d 325 (5th Cir. 1973) . . . . . 22

*Chemical Specialties Manufacturers Ass'n* v. *Lowery*, 452 F.2d 431 (2d Cir. 1971) . . . . . 22

*Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992) . . . . . *passim*

*Comeaux* v. *National Tea Co.*, 81 F.3d 42 (5th Cir. 1996) . . . . . 10, 14

*Committee of Dental Amalgam Manufacturers and Distributors* v. *Stratton*, 92 F.3d 807 (9th Cir. 1996), cert. denied 117 S. Ct. 754 (1997) . . . . . 17

*Cortez* v. *MTD Products, Inc.*, 927 F. Supp. 386 (N.D. Cal. 1996) . . . . . 23

*D-Con Co.* v. *Allenby*, 728 F. Supp. 605 (N.D. Cal. 1989) . . . . . 13

*DerGazarian* v. *Dow Chemical Co.*, 836 F. Supp. 1429 (W.D. Ark. 1993) . . . . . 13

*Duplin* v. *Whink Products Co.*, 1994 WL 197612 (Conn. Super. Ct. May 2, 1994) . . . . . 11

*Ferebee* v. *Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.), cert. denied, 469 U.S. 1062 (1984) . . . . . 11

*Goodwin* v. *Bacon*, 896 P.2d 673 (Wash. 1995) . . . . . 12, 13

*Grenier* v. *Vermont Log Buildings, Inc.*, 96 F.3d 559 (1st Cir. 1996) . . . . . 21

## TABLE OF AUTHORITIES — Continued

Page

*Harris* v. *Ford Motor Co.*, 110 F.3d 1410 (9th Cir. 1997) . . . . . 17, 18

*Hunnings* v. *Texaco, Inc.*, 29 F.3d 1480 (11th Cir. 1994) . . . . . 21, 22

*Industrial Truck Ass'n* v. *Henry*, 1997 W.L. 594619 (9th Cir. Sept. 29, 1997) . . . . . 16, 18

*Jenkins* v. *Amchem Products, Inc.*, 886 P.2d 869 (Kan. 1994), cert. denied, 116 S. Ct. 80 (1995) . . . . . 12, 13

*Jenkins* v. *James B. Day & Co.*, 634 N.E.2d 998 (Ohio 1994) . . . . . 11

*Kernats by Kernats* v. *Smiths Industries Medical Systems, Inc.*, 669 N.E.2d 1300 (Ill. App. Ct.), appeal denied, 675 N.E. 2d 634 (Ill. 1996), pet. for cert. filed, 65 U.S.L.W. 3632 (Mar. 4, 1997) (No. 96-1405) . . . . . 21

*King* v. *E.I. Dupont De Nemours & Co.*, 996 F.2d 1346 (1st Cir.), cert. dismissed, 510 U.S. 985 (1993) . . . . . 11

*Kordel* v. *United States*, 335 U.S. 345 (1948) . . . . . 27

*Kuiper* v. *American Cyanamid*, 913 F. Supp. 1236 (E.D. Wis. 1996) . . . . . 13

*Lacey* v. *Lorillard Tobacco Co.*, 956 F. Supp. 956 (N.D. Ala. 1997) . . . . . 23

*Lee* v. *Boyle-Midway Household Products, Inc.*, 792 F. Supp. 1001 (W.D. Pa. 1992) . . . . . 11

**TABLE OF AUTHORITIES — Continued**

**Page**

*Lewis* v. *American Cyanamid Co.*, 682 A.2d 724 (N.J. Super. Ct. App. Div. 1996), cert. granted, 697 A.2d 546 (N.J. 1997) . . . . . 18

*Lowe* v. *Sporicidin International*, 47 F.3d 124 (4th Cir. 1995) . . . . . 12

*Lynnbrook Farms* v. *Smithkline Beecham Corp.*, 79 F.3d 620 (7th Cir.), cert. denied 117 S. Ct. 178 (1996) . . . . . 23

*MacDonald* v. *Monsanto*, 27 F.3d 1021 (5th Cir. 1994) . . . . . 11, 15

*Macrie* v. *SDS Biotech Corp.*, 630 A.2d 805 (N.J. Super. App. Div.), cert. denied, 636 A.2d 522 (N.J. 1993) . . . . . 13

*Malone* v. *American Cyanamid Co.*, 649 N.E.2d 493 (Ill. Ct. App.), appeal denied, 657 N.E. 2d 624 (Ill. 1995) . . . . . 13

*Medtronic, Inc.* v. *Lohr*, 116 S. Ct. 2240 (1996) . . . . . *passim*

*Mitchell* v. *Collagen Corp.*, 1997 WL 584550 (7th Cir. Sept. 23, 1997) . . . . . 17, 20, 21

*Moe* v. *MTD Products, Inc.*, 73 F.3d 179 (8th Cir. 1995) . . . . . 23

*Moore* v. *B&C Family Center, Inc.*, 272 N.W.2d 150 (Mich. Ct. App. 1978) . . . . . 22

*Morales* v. *Trans World Airlines*, 504 U.S. 374 (1992) . . . . . 16, 18

*Moss* v. *Parks Corp.*, 985 F.2d 736 (4th Cir.), cert. denied, 509 U.S. 906 (1993) . . . . . 2, 11, 14

*New York State Pesticide Coalition, Inc.* v. *Jorling*, 874 F.2d 115 (2d Cir. 1989) . . . . . 12

## TABLE OF AUTHORITIES — Continued

Page

*Oja* v. *Howmedica, Inc.*, 111 F.3d 782 (10th Cir. 1997) . . . . . 17

*Papas* v. *Upjohn*, 985 F.2d 516 (11th Cir.), cert. denied, 510 U.S. 913 (1993) . . . . . 9. 12, 13

*Papas* v. *Zoecon Corp.*, 505 U.S. 1215 (11th Cir. 1992) . . . . . 19

*Papike* v. *Tambrands Inc.*, 107 F.3d 737 (9th Cir. 1997), pet. for cert. filed, 66 U.S.L.W. 3107 (July 15, 1997) (No. 97-94) . . . . . 17

*Pilot Life Insurance. Co.* v. *Dedeaux*, 481 U.S. 41 (1987) . . . . . 18

*Pinckney* v. *Zep Manufacturing Co.*, 1997 WL 204903 (N.D.N.Y. Apr. 15, 1997) . . . . . 22

*Salazar* v. *Whink Products Co.*, 881 P.2d 431 (Colo. Ct. App. 1994), cert. denied, 514 U.S. 1004 (1995) . . . . . 11

*San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959) . . . . . 18, 19

*Schuver* v. *E.I. du Pont de Nemours & Co.*, 117 S. Ct. 274 (1996) . . . . . 19

*Shaw* v. *Dow Brands, Inc.*, 994 F.3d 364 (7th Cir. 1993) . . . . . 11

*State ex rel. Jones Chemicals, Inc.* v. *Seier*, 871 S.W.2d 611 (Mo. Ct. App. 1994) . . . . . 11

*Taylor AG Industries* v. *Pure-Gro*, 54 F.3d 555 (9th Cir. 1995) . . . . . 7, 11, 12

*Toy Manufacturers of America* v. *Blumenthal*, 986 F.2d 615 (2d Cir. 1993) . . . . . 21, 22

*United States* v. *Salerno*, 481 U.S. 739 (1987) . . . . . 15, 16

## TABLE OF AUTHORITIES — Continued

Page

*Wallace* v. *Parks Corp.*, 629 N.Y.S.2d 570 (N.Y. App. Div. 1995) . . . . . 11

*Worm* v. *American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993) . . . . . 11, 12

*Wright* v. *Dow Chemical U.S.A.*, 845 F. Supp. 503 (M.D. Tenn. 1993) . . . . . 13

**Statutes and Regulations:**

7 U.S.C. § 136(p)(1) . . . . . 28

7 U.S.C. § 136(p)(2) . . . . . 28

7 U.S.C. § 136v . . . . . 6, 11, 22

15 U.S.C. § 1203 . . . . . 18

15 U.S.C. § 1203(a) . . . . . 22

15 U.S.C. § 1261 note . . . . . *passim*

15 U.S.C. § 1261(f)(1) . . . . . 2

15 U.S.C. § 1261(n) . . . . . 6, 28

15 U.S.C. § 1261(p) . . . . . 2

15 U.S.C. § 1261(p)(1) . . . . . 19

15 U.S.C. § 1261(p)(1)(A)-(J) . . . . . 2

15 U.S.C. § 1261(p)(1)(C) . . . . . 30

15 U.S.C. § 1261(q) . . . . . 2

15 U.S.C. § 1262(b) . . . . . 2, 3

15 U.S.C. § 1269 . . . . . 2

15 U.S.C. § 1278 note . . . . . 22

15 U.S.C. § 1331-1340 . . . . . 23

15 U.S.C. § 1461 . . . . . 22

## TABLE OF AUTHORITIES — Continued

Page

15 U.S.C. § 1476(a) . . . . . 22
15 U.S.C § 2075(a) . . . . . 22, 23
15 U.S.C. § 2311(c) . . . . . 22
15 U.S.C.§ 1203(a) . . . . . 22
16 C.F.R. §§ 1500.1-.214 . . . . . 21
16 C.F.R. § 1500.3(c)(9) . . . . . 6
16 C.F.R. § 1500.7 (1974) . . . . . 28
16 C.F.R. § 1500.7(d) . . . . . 29
16 C.F.R. § 1500.14(a)(3) . . . . . 3
16 C.F.R. § 1500.14(b)(3)(ii) . . . . . 3
16 C.F.R. § 1500.14(b)(3)(iii) . . . . . 3
21 C.F.R. § 191.4 (1973) . . . . . 28
21 U.S.C. § 321(k) . . . . . 28
21 U.S.C. § 321(m) . . . . . 27
21 U.S.C. § 343-1(a) . . . . . 22
21 U.S.C. § 360k . . . . . 16, 29, 23
21 U.S.C. § 360kk(a)(1) . . . . . 18
21 U.S.C. § 467e . . . . . 22
21 U.S.C. § 678 . . . . . 22
21 U.S.C. § 1052 . . . . . 22
42 U.S.C. § 6297(a) . . . . . 22, 23
42 U.S.C. § 6363(e)(1) . . . . . 23
42 U.S.C. § 14322(e) . . . . . 23
49 U.S.C. App. § 1305(a)(1) . . . . . 18

## TABLE OF AUTHORITIES — Continued

Page

49 U.S.C. App. § 30103(b) . . . . . 18

Cal. Code Regs. tit. 22, § 12000 (1996) . . . . . 4

Cal. Code Regs. tit. 22, § 12601(a) (1996) . . . . . 4

Cal. Code Regs. tit. 22, § 12601(b)(1) (1996) . . . . . 4, 6

Cal. Code Regs. tit. 22, § 12601(b)(3) (1996) . . . . . 4

Cal. Code Regs. tit. 22, § 12601(b)(4)(B) (1996) . . . . . 4

Cal. Health & Safety Code § 25249.6 (West 1992 & Supp. 1997) . . . . . 3, 4

Cal. Health & Safety Code § 25249.7 (West 1992 & Supp. 1997) . . . . . 4

Cal. Health & Safety Code § 25249.10(a) (West 1992 & Supp. 1997) . . . . . 4

Cal. Health & Safety Code § 25249.11(f) (1992 & Supp. 1997) . . . . . 10

37 Fed. Reg. 18628 (Sept. 13, 1972) . . . . . 28

38 Fed. Reg. 27012 (Sept. 27, 1973) . . . . . 28

47 Fed. Reg. 57489 (Dec. 27, 1982) . . . . . 29

57 Fed. Reg. 38758 (Aug. 27, 1992) . . . . . 23

**Miscellaneous:**

Advisory Op. No. 312 (Mar. 6, 1991) . . . . . 8, 27

An Act Entitled The "Massachusetts Citizens' Right To Know Act," 1997 MA S.B. 488 (Jan. 1, 1997) . . . . . 24

H.R. Conf. Rep. No. 1022, 94th Cong., 2d Sess., *reprinted in* 1977 U.S.C.C.A.N. 1030 . . . . . 22

## TABLE OF AUTHORITIES — Continued

Page

H.R. Rep. No. 325, 94th Cong., 1st Sess. (1975) . . . . . 25

Letters Desk, L.A. Times, Sept. 8, 1997 . . . . . 24

Rechtschaffen, *The Warning Game: Evaluating Warnings Under California's Proposition 65*, 23 ECOLOGY L.Q. 303 (1996) . . . . . 24

S. Rep. No. 251, 94th Cong., 2d Sess., *reprinted in* 1976 U.S.C.C.A.N. 993 . . . . . 22

## PETITION FOR A WRIT OF CERTIORARI

---

### OPINIONS BELOW

The opinion of the California Court of Appeal (App., *infra*, 1a-26a) is reported at 53 Cal. App. 4th 1373, 62 Cal. Rptr. 2d 368. The order of the California Supreme Court denying review (App., *infra*, 27a) is unreported. The trial court's order resolving the cross-motions for summary disposition of the preemption issue (App., *infra*, 28a-29a) is unreported.

### JURISDICTION

The California Court of Appeal's judgment was entered on March 31, 1997. The California Supreme Court's order denying review was entered on July 9, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

### STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Federal Hazardous Substances Act (15 U.S.C. §§ 1261-1277), the implementing regulations of the Consumer Product Safety Commission (16 C.F.R. § 1500.1 *et seq.*), the California Safe Drinking Water and Toxic Enforcement Act of 1986 (Cal. Health & Safety Code § 25249.5 *et seq.*), and the implementing California regulations (Cal. Code Regs. tit. 22, § 12000 *et seq.*) are set forth at App., *infra*, 41a-47a.

### STATEMENT

Through a ballot initiative popularly known as "Proposition 65," California seeks to require manufacturers, distributors and retailers of consumer products that contain hazardous substances to provide particular warnings. The California-required warnings are different from, and in addition to, the warnings and cautionary statements mandated for those products by the Federal Hazardous Substances Act (FHSA) and by the Consumer Product Safety Commission (CPSC), the federal agency that administers the FHSA. The California Attorney General initiated this Proposition 65 enforcement action alleging that petitioner TruServ Corporation (formerly known as Cotter & Company), a member-owned national cooperative, failed to provide the warnings required by Proposition 65 for numerous spray paints, primers, adhesives and other products sold in hundreds of independently owned and operated True Value® Hardware stores in California.

Petitioner maintained that California's warning requirements were expressly preempted by the FHSA, which bars States from imposing any "cautionary labeling requirement" on a hazardous substance that is subject to a federal cautionary labeling requirement that targets the same risk of injury, unless the state and federal requirements are identical. 15 U.S.C. § 1261 note. A California trial court rejected petitioner's preemption defense, and the Court of Appeal affirmed in a lengthy, published opinion.

**A. The Statutory And Regulatory Framework.**

**1. The Federal Hazardous Substances Act And The Federal Toluene Regulation.** The FHSA was enacted in 1960 "to 'provide nationally uniform requirements for adequate cautionary labeling of packages of hazardous substances which are sold in interstate commerce and are intended or suitable for household use.'" *Moss* v. *Parks Corp.*, 985 F.2d 736, 739 (4th Cir.) (quoting H.R. Rep. No. 1861, 86th Cong., 2d Sess. 2 (1960)), cert. denied, 509 U.S. 906 (1993); App., *infra*, 15a.[1] Toward that end, the statute imposes detailed and specific requirements concerning the cautionary labeling of all hazardous substances. See 15 U.S.C. § 1261(p)(1)(A)-(J). It also vests the CPSC with comprehensive and exclusive authority to regulate hazardous substances. See 15 U.S.C. §§ 1261(q), 1262(b), 1269.

To ensure the national uniformity of cautionary labeling requirements for hazardous substances, the FHSA provides:

> [I]f a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) [15 U.S.C. §§ 1261(p), 1262(b)] designed to protect against a risk of illness or injury associated with the substance, no State or political subdivision of a State may establish or continue in

---

[1] The statute defines "hazardous substance" to include any substance that is toxic, corrosive, flammable, combustible, "an irritant," or "a strong sensitizer," or that "generates pressure through decomposition, heat, or other means, if such substance[ ] * * * may cause substantial" injury. 15 U.S.C. § 1261(f)(1)(A). The term also encompasses certain radioactive substances as well as toys and other articles that "present[ ] an electrical, mechanical, or thermal hazard." *Id.* § 1261(f)(1)(C), (D).

> effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under section 2(p) or 3(b).

15 U.S.C. § 1261 note. The statute authorizes the CPSC to grant exemptions from preemption for state requirements that "provide[ ] a significantly higher degree of protection" than the federal requirements, "do[ ] not unduly burden interstate commerce," and (if complied with) "would not cause the hazardous substance" to violate any federal cautionary labeling requirement. *Ibid.*

In addition to mandating the inclusion of certain information and warnings in all hazardous substances labeling, the FHSA authorizes the CPSC to impose additional labeling requirements when, in the agency's judgment, such requirements are "necessary for the protection of the public health and safety." 15 U.S.C. § 1262(b). Exercising that authority, the CPSC has determined that certain additional warnings are required for products "containing * * * 10 percent or more by weight of toluene" (a chemical solvent contained in the products at issue in this litigation). 16 C.F.R. § 1500.14(a)(3). Specifically, the CPSC has determined that such products "shall be labeled with the signal word 'danger,' the statement of hazard 'Harmful or fatal if swallowed,' and the statement 'Call physician immediately.'" *Id.* § 1500.14(b)(3)(ii). In addition, because the "inhalation of the vapor of products containing 10 percent or more by weight of toluene * * * may cause systemic injury, such products shall bear the statement of hazard 'Vapor harmful'" as well. *Id.* § 1500.14(b)(3) (iii).

**2. Proposition 65.** In 1986, the voters of California approved Proposition 65, formally known as the "California Safe Drinking Water and Toxic Enforcement Act of 1986." Proposition 65 establishes the following warning requirement:

> No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual * * *.

Cal. Health & Safety Code § 25249.6 (West 1992 & Supp. 1997). Violations of Section 25249.6 "may be enjoined" and are subject to "a civil penalty not to exceed $2500 per day." *Id.* § 25249.7(a), (b). Proposition 65 authorizes enforcement actions not only by the California Attorney General and certain other state and local authorities but also "by any person in the public interest," if the private enforcement action is commenced "more than sixty days" after notice is provided to the "alleged violator" and to state officials, and the latter decline to "commence[ ] and diligently prosecute an action." *Id.* § 25249.7(c), (d). Proposition 65 contains an exemption from the warning requirement for "[a]ny exposure for which federal law governs warning in a manner that preempts state authority." *Id.* § 25249.10(a).

On January 1, 1992, one year after the State of California classified toluene as a reproductive toxin (Cal. Code Regs. tit. 22, § 12000 (1996)), the warnings required under Proposition 65 became effective for the chemical. App., *infra*, 2a n.3. Thereafter, consumer products containing toluene were required by California law to be accompanied by warnings that "clearly communicate that the chemical in question is known to the state to cause * * * birth defects or other reproductive harms." Cal. Code Regs. tit. 22, § 12601(a) (1996); see also *id.* § 12601(b)(1)(A)-(B), 12601(b)(3), (b)(4)(B) (compliance with Proposition 65 may be ensured by providing the following statement either "prominently placed" in the product labeling or "conspicuous[ly]" displayed in a "sign" at the retail outlet: "WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm.").

**B. The Proceedings Below.**

**1. The Trial Proceedings**. After a nonprofit organization called "As You Sow" alleged that petitioner had failed to provide adequate warnings of toluene exposure in violation of Proposition 65, the California Attorney General filed this lawsuit in the state superior court. App., *infra*, 2a-3a; California Court of Appeal Joint Appendix (C.A. App.) 1-9. As You Sow subsequently intervened. App., *infra*, 25a n.23.

Petitioner raised the defense of preemption in its answer. C.A. App. 11, 384. Petitioner subsequently moved for summary

judgment on the ground that the Proposition 65 claims were preempted by the FHSA. C.A. App. 430-454. Those claims, petitioner argued, rested on the premise that the federally required labeling of products containing toluene was inadequate, and sought, impermissibly, to impose a different state "cautionary labeling requirement" on these products. The State filed a cross-motion for summary adjudication, which As You Sow joined. C.A. App. 743-778, 1665-1668. Relying principally on *Chemical Specialties Mfrs. Ass'n, Inc.* v. *Allenby*, 958 F.2d 941 (9th Cir.), cert. denied, 506 U.S. 825 (1992), the superior court granted respondents' motion for summary adjudication and denied petitioner's motion for summary judgment. App., *infra*, 28a-29a.

Petitioner then entered into a consent judgment requiring it to pay $275,000 in penalties and restitution for the Proposition 65 violations, but preserving petitioner's right to appeal from the preemption ruling. App., *infra*, 3a, 32a-33a, 36a-37a.[2]

**2. The Court Of Appeal's Decision.** The California Court of Appeal, First Appellate District, affirmed the superior court's preemption ruling in a lengthy opinion. App., *infra*, 1a-26a.

The Court of Appeal characterized petitioner's preemption defense to this enforcement action as raising a "facial challenge to Proposition 65," which, to succeed, "must establish [that] Proposition 65 would not be valid under *any* set of circumstances." App., *infra*, 5a (citing *Allenby*) (emphasis added). Next, the Court of Appeal "review[ed] the federal preemption doctrine" and summarized this Court's decisions in *Medtronic, Inc.* v. *Lohr*, 116 S. Ct. 2240 (1996), and *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992). App., *infra*, 6a, 8a-10a. The court purported to derive two principles from *Medtronic*. First, "a decision regarding preemption should consider the 'generality' of the federal statute" because, if federal requirements are general, they are unlikely to be preemptive. App, *infra*, 10a. Second, "courts should broadly interpret the preemption provision of federal statutes with

---

[2] To avoid the accumulation of daily penalties under Proposition 65, petitioner also agreed, in 1994, to the entry of a permanent injunction governing the provision of future warnings. See App., *infra*, 33a, 37a. That order is not at issue in this case.

limited applicability and narrowly interpret those statutes with general applicability." *Id.* at 9a.

The Court of Appeal next examined the pre-*Cipollone* decision in *Allenby*, which held that Proposition 65 was not facially invalid under either the FHSA or the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136v. The Ninth Circuit had rested its conclusion on California regulations that implement Proposition 65, which recognize "four types of 'safe harbor' warnings for consumer products": "product labeling, 'shelf labeling, signs, menus, or a combination thereof.'" App., *infra*, 4a, 11a-12a (quoting Cal. Code Regs. tit. 22, § 12601(b)(1)(B)). The FHSA's preemption of certain state "cautionary labeling requirement[s]," the Ninth Circuit reasoned, does not extend to state-mandated warnings in materials other than the product "label."[3] Because a retailer may comply with Proposition 65 by providing warnings in point-of-sale signs, and because such signs do not qualify as "labels" as that term is defined in the FHSA, the *Allenby* court concluded, the requisite showing for a facial challenge cannot be made. 958 F.2d at 943, 949-50.

---

[3] In concluding that a point-of-sale sign does not qualify as a "label" under the FHSA, the *Allenby* court relied on the following definition:

> The term "label" means a display of written, printed, or graphic matter upon the immediate container of any substance or, in the case of an article which is unpackaged * * * , a display of such matter directly upon the article involved or upon a tag or other suitable material affixed thereto; and a requirement made by or under authority of this chapter that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears (1) on the outside container or wrapper, if any there be, unless it is easily legible through the outside container or wrapper and (2) on all *accompanying literature* where there are *directions for use*, written or otherwise.

15 U.S.C. § 1261(n) (emphasis added). The CPSC's regulations define "accompanying literature" to include point-of-sale signs. See 16 C.F.R. § 1500.3(c)(9).

The California Court of Appeal adopted the analysis of *Allenby* and held that "the preemption provision in the FHSA only applies to 'cautionary labels' on packages." App., *infra*, 11a. It rejected the argument that *Cipollone*, by holding that "the central inquiry for preemption is whether the state and federal statutes have the same predicate duty," had undermined *Allenby*'s rationale. *Id.* at 12a. According to the Court of Appeal, *Medtronic* established that *Cipollone*'s framework for analysis "does not apply when both the federal and state statutes require a *general* warning for a variety of products and do not target *specific* products." App., *infra*, 13a (emphasis added).

The Court of Appeal also expressly endorsed "*Allenby*'s analysis of labels under the FHSA." App., *infra*, 14a. In interpreting the FHSA's definition of "label" and of the phrase "accompanying literature where there are directions for use" (see note 3, *supra*), the Court of Appeal stated that, "[f]ollowing *Medtronic*, we must interpret the words in the preemption statute narrowly when the federal statute and state statute have general applicability." App., *infra*, 15a. Because the FHSA "is an extremely broad statute," the Court of Appeal opined, it must be narrowly interpreted under *Medtronic*. *Id.* at 16a. The Court of Appeal nevertheless agreed with petitioner that the warnings required by Proposition 65 in this case target the same risk as the warnings mandated under the FHSA. *Id.* at 16a-17a n.13.

The Court of Appeal acknowledged that the language of FIFRA's preemption provision is "essentially identical" to FHSA's preemption provision and that "numerous FIFRA cases" — including *Taylor AG Indus.* v. *Pure-Gro*, 54 F.3d 555 (9th Cir. 1995) — have held that "FIFRA preempt[s] common law claims based on inadequate point of sale warnings." App., *infra*, 17a. Nevertheless, the court concluded that those FIFRA cases were distinguishable, expressly disagreeing with the Ninth Circuit's conclusion in *Allenby* that "the issue of preemption arising under FIFRA is identical to that under the FHSA." *Id.* at 19a n.16.

The Court of Appeal also acknowledged that common law damages actions "pose the same questions and issues" in determining the "scope of preemption" as do cases involving enforcement actions. Nevertheless, the court sought to distinguish

the FIFRA cases precisely because many of them involved common law claims, asserting that the "analyses of tort and enforcement actions diverge in a materially significant respect" once "the preempted domain" is determined. App., *infra*, 20a. The court elaborated (*ibid.*):

> Once the court determines a common law claim falls within the reach of the preemption clause, the analysis ceases. The federal government's interest in promoting interstate commerce always trumps the individual's interest in receiving damages.
>
> Unlike a tort action, an enforcement action requires the court to establish whether any method of compliance with the state statute falls outside the scope of the preemption provision. If any method is beyond the reach of the preemption provision, the statute remains valid.

Thus, the court concluded, "an enforcement action *never* requires the court to assess the adequacy of the label, while that is the task facing the court in a tort action." *Id.* at 21a (emphasis added).

Finally, the Court of Appeal rejected petitioner's argument that it should reconsider and reject *Allenby*'s interpretation of the phrase "directions for use" because the CPSC General Counsel, in an advisory opinion, has interpreted the phrase more broadly to include warnings in point-of-sale signs such as those required under Proposition 65. App., *infra*, 21a-22a. Under the agency's interpretation, a warning that a product can cause cancer or birth defects "'can also serve as a direction for use'" because it "'conveys the information that, in using the product, steps should be taken to minimize or eliminate exposure.'" *Id.* at 21a (quoting Advisory Op. No. 312, at 3 (Mar. 6, 1991)). The Court of Appeal refused to defer to this agency interpretation, however, on the ground that it was "plainly erroneous and entitled to no deference." *Id.* at 22a (internal quotations omitted).

On July 9, 1997, the California Supreme Court denied petitioner's request for review. App., *infra*, 29a.

## REASONS FOR GRANTING THE PETITION

This case presents the Court with an opportunity to resolve a number of significant issues as to which the lower courts are in conflict concerning the preemptive scope of the FHSA, an important federal statute that applies to thousands of consumer products. Because more than a dozen other federal preemption provisions mirror the FHSA in barring the imposition of state "labeling" requirements, this Court's review would also go far in clarifying the law and resolving various conflicts under those statutes. And this case is an ideal vehicle for the Court to bring greater clarity generally to the law of federal preemption, which in recent years has spawned substantial litigation as courts have struggled to interpret and apply *Medtronic, Inc.* v. *Lohr*, 116 S. Ct. 2240 (1996), and *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992). With its heavy reliance on a host of secondary and tertiary rules of interpretation (rather than on a straightforward examination of the text and structure of the FHSA's preemption provision), the lower court's opinion provides a compelling illustration of the need for greater guidance and clarification from this Court.

### I. THE DECISION BELOW CONFLICTS IN MULTIPLE RESPECTS WITH THE DECISIONS OF OTHER COURTS

#### A. Courts Are Deeply Divided Over Whether FHSA And Other Federal Statutes That Expressly Preempt State "Labeling" Requirements Nevertheless Permit States To Require Warnings Outside The Product "Label"

Warnings can be communicated on a product's label, in point-of-sale signs, or in many other ways. If federal law requires a warning on the product's "label," and state law requires some other warning *outside* of the "label," the necessary premise of the state law is that the federally mandated warnings are inadequate. See, *e.g.*, *Papas* v. *Upjohn Co.*, 985 F.2d 516, 519 (11th Cir.) ("any claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff *necessarily challenge the adequacy of the warnings provided on the product's labeling or packaging*") (emphasis added), cert. denied, 510 U.S. 913 (1993). Nevertheless, paying more attention to the placement of the required warning than to the State's reason for

requiring that warning, the Court of Appeal concluded that the FHSA's express preemption of state "cautionary labeling requirement[s]" does not include cautionary warnings that are required to be communicated outside of the "label." The Court of Appeal's reasoning cannot be squared with a long line of decisions involving preemption under the FHSA and other federal statutes that preempt state "labeling" requirements.

Federal and state courts have held that failure-to-warn claims brought under state tort law are preempted by the FHSA. The common law "duty to warn" invoked by such claims — and held to be preempted — is not a duty to warn through a particular *means* of communication; the defendant could discharge its duty by providing warnings *outside the product label*, such as in point-of-sale signs or through face-to-face communication.[4] Nevertheless, courts have repeatedly concluded that failure-to-warn claims are entirely preempted — despite the urging of some plaintiffs to hold them preempted only insofar as they would require additional warnings in product labels.

For example, in *Comeaux* v. *National Tea Co.*, 81 F.3d 42 (1996), the Fifth Circuit concluded that a failure-to-warn claim brought under Louisiana law against the manufacturer of lighter fluid was preempted by the FHSA, because the FHSA and its implementing regulations imposed labeling requirements on the product. "The FHSA," the Fifth Circuit categorically declared, "preempts *any* state law warning requirements other than those imposed by the FHSA and its implementing regulations." *Id.* at 43 (emphasis added); see also *id.* at 44 (stating that FHSA preempts "any other or further warnings requirements").

Similarly, the Fourth Circuit has concluded that a "common law tort action based upon failure to warn may only be brought for non-compliance with existing federal labeling requirements"

---

[4] Proposition 65 mirrors the common law duty to warn by stating that warnings "may be provided by general methods such as labels on consumer products, inclusion of notices in mailings to water customers, posting of notices, placing notices in public news media, and the like, provided that the warning accomplished is clear and reasonable." Cal. Health & Safety Code § 25249.11(f) (West 1992 & Supp. 1997).

imposed under FHSA. *Moss* v. *Parks Corp.*, 985 F.2d 736, 740 (4th Cir.), cert. denied, 509 U.S. 906 (1993). Other courts have also concluded that the FHSA preempts failure-to-warn claims.[5]

Federal and state courts have reached the same conclusion in cases involving preemption of failure-to-warn claims under FIFRA. As the California Court of Appeal acknowledged, the language of FIFRA's preemption clause "is essentially identical" to the FHSA's. App., *infra*, 17a. Like the FHSA preemption provision, the FIFRA preemption clause reaches all state "requirements *for labeling* or packaging" that are not identical to "those required" under FIFRA. 7 U.S.C. § 136v (emphasis added). Almost without exception, the federal courts of appeals have held that state tort claims for failure to warn are preempted even where such warnings could be communicated through means other than the product labeling — including through point-of-sale signs.[6]

---

[5] See, *e.g.*, *Lee* v. *Boyle-Midway Household Prods., Inc.*, 792 F. Supp. 1001, 1007-09 (W.D. Pa. 1992); *Salazar* v. *Whink Prods. Co.*, 881 P.2d 431 (Colo. Ct. App. 1994), cert. denied, 514 U.S. 1004 (1995); *Busch* v. *Graphic Color Corp.*, 662 N.E.2d 397, 405-06 (Ill.), cert. denied, 117 S. Ct. 55 (1996); *State ex rel. Jones Chemicals, Inc.* v. *Seier*, 871 S.W. 2d 611 (Mo. Ct. App. 1994); *Canty* v. *Ever-Last Supply Co.*, 685 A.2d 1365, 1374-75 (N.J. Super. Ct. 1996); *Beyrle* v. *Finneron*, 645 N.Y.S.2d 192, 193 (N.Y. App. Div. 1996); *Wallace* v. *Parks Corp.*, 629 N.Y.S.2d 570, 573-74 (N.Y. App. Div. 1995); *Jenkins* v. *James B. Day & Co.*, 634 N.E.2d 998 (Ohio 1994). But see *Duplin* v. *Whink Prods. Co.*, 1994 WL 197612 (Conn. Super. Ct. May 2, 1994).

[6] See *King* v. *E.I. Dupont De Nemours & Co.*, 996 F.2d 1346, 1349-50 (1st Cir.), cert. dismissed, 510 U.S. 985 (1993); *Worm* v. *American Cyanamid Co.*, 5 F.3d 744, 748 (4th Cir. 1993); *MacDonald* v. *Monsanto Co.*, 27 F.3d 1021, 1024-25 (5th Cir. 1994); *Shaw* v. *Dow Brands, Inc.*, 994 F.2d 364, 369-71 & n.4 (7th Cir. 1993); *Bice* v. *Leslie's Poolmart, Inc.*, 39 F.3d 887, 888 (8th Cir. 1994); *Taylor AG Indus.* v. *Pure-Gro*, 54 F.3d 555, 561 (9th Cir. 1995); *Arkansas-Platte & Gulf Partnership* v. *Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir.), cert. denied, 510 U.S. 813 (1993); *Papas*, 985 F.2d at 519. But see *Ferebee* v. *Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir.), cert. denied, 469 U.S. 1062 (1984).

Many of these federal decisions specifically mention point-of-sale signs as an alternative method of satisfying the duty to warn and reject the argument that such signs are not preempted by FIFRA. For example, the Eleventh Circuit in *Papas* stated:

> Appellants * * * contend that because the language of 136v refers only to "labeling or packaging," the section does not pre-empt failure to warn claims based on *point-of-sale signs, consumer notices, or other informational materials that are "unrelated" to labeling and packaging*. * * * If a pesticide manufacturer places EPA-approved warnings on the label and packaging of its product, its duty to warn is satisfied, and the adequate warning issue ends. Plaintiffs may not interfere with the FIFRA scheme by bringing a common law action alleging the inadequacy of, for example, point-of-sale signs.

985 F.2d at 519 (emphasis added). The Fourth and Ninth Circuits and the Supreme Courts of Washington and Kansas have reached exactly the same conclusion. See *Worm* v. *American Cyanamid Co.*, 5 F.3d 744, 748 (4th Cir. 1993); *Taylor AG Indus.* v. *Pure-Gro*, 54 F.3d 555, 561 (9th Cir. 1995); *Goodwin* v. *Bacon*, 896 P.2d 673, 681 (Wash. 1995); *Jenkins* v. *Amchem Prods., Inc.*, 886 P.2d 869, 881-82 (Kan. 1994), cert. denied, 116 S. Ct. 80 (1995).

These decisions rest on the sensible notion that any "claim for inadequate point-of-sale warnings" is "premised ultimately upon the inadequacy of the product label." *Taylor*, 54 F.3d at 561. Accord *Papas*, 985 F.2d at 519; *Worm*, 5 F.3d at 748; *Lowe* v. *Sporicidin Int'l*, 47 F.3d 124, 129-30 (4th Cir. 1995). In contrast, a minority of federal and state courts have concluded, as did the Court of Appeal in this case, that a state-imposed obligation to provide warnings is not preempted as a "labeling" requirement unless it mandates the inclusion of warnings *in the product's "label."* For example, the Second Circuit, in *New York State Pesticide Coalition, Inc.* v. *Jorling*, 874 F.2d 115 (1989), held that FIFRA preempts only state requirements in "labeling" or "packaging" and that these terms do not include signs aimed at providing information to the general public. *Id.* at 118-20.[7]

---

[7] See also *Burke* v. *Dow Chem. Co.*, 797 F. Supp. 1128, 1140

Tellingly, both lines of cases purport to derive support from *Cipollone*. For example, the Eleventh Circuit in *Papas* (985 F.2d at 518-19) relied on Justice Stevens' plurality opinion in *Cipollone*, which concluded that the plaintiffs' failure to warn claims were preempted "insofar as [they] * * * require a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated, warnings." 505 U.S. at 524. On the other hand, the district court in *Burke* v. *Dow Chem. Co.*, 797 F. Supp. 1128, 1138, 1140-41 (E.D.N.Y. 1992), took note of the *Cipollone* plurality's refusal to find plaintiffs' fraudulent concealment claims preempted "insofar as those claims rely on a state-law duty to disclose such facts through channels of communication other than advertising or promotion." 505 U.S. at 528. Only this Court can definitively reconcile the statements that have led the lower courts into conflict.

The sharp conflict between these two lines of FIFRA decisions has been widely noted.[8] To resolve this far-reaching conflict over the scope of preemption effected by federal statutes that displace state "labeling requirements," further review by this Court is needed.

---

(E.D.N.Y. 1992); *D-Con Co.* v. *Allenby*, 728 F. Supp. 605, 607 (N.D. Cal. 1989) ("[m]any warning methods, including the point-of-sale signs currently designated a 'safe harbor' under Prop 65, may satisfy the requirements of the state of California without infringing on federal supremacy in the area of pesticide labeling"); *Malone* v. *American Cyanamid Co.*, 649 N.E.2d 493, 498-99 (Ill. Ct. App.), appeal denied, 657 N.E.2d 624 (Ill. 1995); *Macrie* v. *SDS Biotech Corp.*, 630 A.2d 805, 812-13 (N.J. Super. A.D.), cert. denied, 636 A.2d 522 (N.J. 1993).

[8] See, *e.g.*, *Kuiper* v. *American Cyanamid Co.*, 913 F. Supp. 1236, 1239-45 (E.D. Wis. 1996) (reviewing conflict and expressly disagreeing with *Burke* and *Malone*); *Wright* v. *Dow Chem. U.S.A.*, 845 F. Supp. 503, 508 n.2, 510 (M.D. Tenn. 1993) (disagreeing with *Burke*); *DerGazarian* v. *Dow Chemical Co.*, 836 F. Supp. 1429, 1433-47 & nn.1-2 (W.D. Ark. 1993) (extensively reviewing the "split of authority"); *Goodwin*, 896 P.2d at 681 (noting conflict and agreeing with "the majority of courts" that have "refus[ed] to distinguish non-label failure to warn"); *Jenkins*, 886 P.2d at 881-82 (same).

### B. The Court Of Appeal's Conclusions That FHSA And FIFRA Preemption Are Not Coextensive, And That Preemption Cases Involving Common Law Claims Are Immaterial To Enforcement Actions, Conflict With The Decisions Of Other Courts

The Court of Appeal's holding rested substantially on its conclusion that cases involving FIFRA preemption — including "numerous * * * cases which found [that] FIFRA preempt[s] common law claims based on inadequate point of sale warnings" — are not controlling. App., *infra*, 17a-21a. In addition, the Court of Appeal reasoned that cases involving the preemption of state *common law requirements* are not relevant to cases involving the preemption of a state *statutory requirements*. These conclusions cannot be reconciled with this Court's decisions in *Cipollone* and *Medtronic* or with the decisions of other state and federal courts.

Most courts that have the considered the relationship between FIFRA and FHSA preemption have concluded, contrary to the decision below, that they are coextensive. In *Allenby* the Ninth Circuit stated unequivocally that "[t]he preemption issues arising under FHSA are identical to those arising under FIFRA." 958 F.2d at 945. The Fourth and Fifth Circuits have reached the same conclusion. See *Moss*, 985 F.2d at 740 n.3; *Comeaux*, 81 F.3d at 44. The Illinois Supreme Court has stated that FIFRA's preemption provision "is substantially equivalent * * * to the FHSA's preemption provision." *Busch* v. *Graphic Color Corp.*, 662 N.E.2d 397, 405 (Ill.), cert. denied, 117 S. Ct. 55 (1996); accord *Wallace* v. *Parks Corp.*, 629 N.Y.S.2d 570, 573 (N.Y. App. Div. 1995).

The Court of Appeal acknowledged this conflict by stating that it "disagreed" with *Allenby* on this point. App. *infra*, 19a n.16. This conflict is all the more troubling because California is located within the Ninth Circuit. This Court has repeatedly granted review to resolve conflicts between a state appellate court and the federal circuit in which it is situated, in order to prevent forum-shopping. See *Baldwin* v. *Alabama*, 472 U.S. 372, 374 (1985).

The Court of Appeal's *reasons* for refusing to apply the numerous FIFRA cases discussed above, moreover, conflict with this Court's decisions in *Cipollone* and *Medtronic*. In the lower court's

view, these FIFRA cases are inapposite because they are "predominantly tort common law cases and this is a Proposition 65 enforcement action." App., *infra*, 17a. Damages actions are more easily preempted, the court explained, because "[o]nce the court determines a common law claim falls within the reach of the preemption clause * * * [t]he federal government's interest in promoting interstate commerce *always* trumps the individual's interest in receiving damages." *Id.* at 20a (emphasis added).

That analysis, however, is fundamentally incompatible with this Court's teachings. In *Cipollone* and again in *Medtronic*, a majority of this Court pointedly refused to distinguish for preemption purposes between the "requirements" imposed by state common law and state statutes (or other positive law). See *Medtronic*, 116 S. Ct. at 2259 (opinion of Breyer, J.); *id.* at 2262-63 (O'Connor, J., joined by Rehnquist, C.J., & Scalia & Thomas, JJ., concurring in part and dissenting in part); *Cipollone*, 505 U.S. at 521 (plurality); *id.* at 548-49 (Scalia, J., joined by Thomas, J., concurring in part and dissenting in part). See also *MacDonald* v. *Monsanto*, 27 F.3d 1021, 1024 (5th Cir. 1994). The *Cipollone* plurality stated that the "[t]he phrase 'no requirements or prohibition'" in the federal Cigarette and Labeling and Advertising Act "sweeps broadly and suggests *no distinction* between positive enactments and common law." 505 U.S. at 521 (emphasis added). Even the three Justices who disagreed with this conclusion in *Cipollone* suggested that common law requirements should be given *more*, not *less*, solicitude in any preemption analysis. See *id.* at 534-44 (separate opinion of Blackmun, J., joined by Kennedy & Souter, JJ.).

Even more troubling is the Court of Appeal's related suggestion that cases involving common law claims are distinguishable from enforcement actions because "an enforcement action," unlike a tort action, "requires the court to establish whether *any* method of compliance with the state statute falls outside the scope of the preemption provision." App., *infra*, 20a (emphasis added). The two cases cited for that proposition do not support it; both involved *declaratory judgment actions* seeking a determination that state statutes were *facially invalid*. Therefore, both applied the stringent standard articulated in *United States* v. *Salerno*, 481 U.S. 739, 745 (1987): "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger

must establish that no set of circumstances exists under which the Act would be valid." See *Allenby*, 958 F.2d at 943. Compare *Industrial Truck Ass'n* v. *Henry*, 1997 WL 594619, at *11-*12 (9th Cir. Sept. 29, 1997) (holding, in declaratory judgment action, that Proposition 65 warning requirements are preempted by OSHA "as applied to manufacturers and distributors of industrial trucks").

The Court of Appeal's adoption of the *Salerno* standard for all preemption cases involving the enforcement of state statutes marks a radical — and radically misguided — departure from this Court's preemption cases. See, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (analyzing whether state enforcement actions are preempted without any hint that facial challenge standard governs). It also makes utterly no sense. In defending against this enforcement action, petitioner never undertook (nor had any need to undertake) to show that Proposition 65 was preempted by the FHSA in every conceivable application. On the contrary, as petitioner's answer makes clear, petitioner sought only to make the more limited showing that the FHSA "preempt[s] the application of Proposition 65 * * * to [petitioner's] products." C.A. App. 11. The *Salerno* standard does not govern that inquiry.

### C. The Decision Below Conflicts With Those Of Other Courts Concerning The Applicability Of *Medtronic's* "General/Specific" Distinction Outside Of The Context Of Preemption Under The Medical Device Amendments

The Court of Appeal relied substantially for its holding on *Medtronic*, which construed the express preemption provision of a different statute — the Medical Device Amendments (MDA) to the federal Food, Drug & Cosmetic Act, 21 U.S.C. § 360k. The Court of Appeal interpreted *Medtronic* as altering the basic principles governing preemption analysis (including those set forth in this Court's decision in *Cipollone*) whenever "both the federal and state statutes" at issue "require a *general* warning for a variety of products and do not target *specific* products." App., *infra*, 13a (emphasis added). Applying the "general/specific" distinction it perceived in *Medtronic*, the Court of Appeal concluded that there was no preemption because both the FHSA and Proposition 65 are "general" in nature. *Ibid.*

The Court of Appeal's holding is squarely at odds with the decisions of other federal and state courts. Other courts have concluded that the analytical framework of *Medtronic* (including the "general/specific" distinction) hinged on the unique language of the MDA and, more important, on the interpretation given to the statutory text by the agency charged with administering the statute, the Food and Drug Administration (FDA). Accordingly, many courts have *rejected* the argument that *Medtronic* alters the basic principles governing preemption law and have *refused* to apply *Medtronic*'s "general/specific" distinction outside the MDA context.[9]

Illustrative is *Ackles* v. *Luttrell*, 561 N.W.2d 573 (Neb. 1997), pet. for cert. filed, 66 U.S.L.W. 3137 (Aug. 6, 1997) (No. 97-226). There, the Nebraska Supreme Court rejected the argument that *Medtronic* was applicable to a case involving preemption under FIFRA. "[W]hile at first blush *Medtronic* * * * appears to retreat from * * * *Cipollone*," the court explained, "it was the separate and distinct statutes that were involved in each case that were the determining factor." 561 N.W.2d at 578. Concluding that FIFRA's preemption provision was dissimilar to the statute involved in *Medtronic*, the Nebraska Supreme Court refused to fol-

---

[9] There is also considerable confusion in the lower courts about whether this Court's holding in *Medtronic* rests on the generality of the state (as opposed to the federal) requirements at issue in that case. As the Court of Appeal correctly noted (App., *infra*, 13a), the Ninth Circuit has concluded, in another MDA preemption case, that Proposition 65 is a state law of "general applicability" and thus exempt from MDA preemption under *Medtronic*. See *Committee of Dental Amalgam Mfrs. & Distribs.* v. *Stratton*, 92 F.3d 807, 813 (9th Cir. 1996), cert. denied, 117 S. Ct. 754 (1997). But the Ninth Circuit later repudiated the suggestion in *Stratton* that the outcome in *Medtronic* depended in part on the absence of specificity in the pertinent state requirements. See *Papike* v. *Tambrands Inc.*, 107 F.3d 737, 742 (1997), pet. for cert. filed, 66 U.S.L.W. 3107 (July 15, 1997) (No. 97-94); *Harris* v. *Ford Motor Co.*, 110 F.3d 1410, 1414 n.8 (9th Cir. 1997) ("We do not believe that *Medtronic* precludes express pre-emption when a *state law of general applicability* (like tort law) is involved.") (emphasis added). Other circuits have reached the same conclusion. See *Mitchell* v. *Collagen Corp.*, 1997 WL 584550, at *6 (7th Cir. Sept. 23, 1997). But see *Oja* v. *Howmedica Inc.*, 111 F.3d 782, 788-89 (10th Cir. 1997).

low the framework announced in *Medtronic*. Other courts have reached conflicting results over whether the reasoning of *Medtronic* applies to express preemption under statutes other than the MDA.[10]

The Court of Appeal's use of the "general/specific" distinction as a basis for limiting FHSA preemption is also in significant tension with several pre-*Medtronic* cases in which this Court categorically rejected arguments for similar limitations. For example, in *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992), the Court interpreted a provision of the Airline Deregulation Act of 1978 (ADA) that "pre-empts the States from 'enact[ing] or enforc[ing] any law, rule, regulation, standard or other provision * * * relating to rates, routes, or services of any air carrier.'" *Id.* at 383 (quoting 49 U.S.C. App. § 1305(a)(1)). The Court flatly rejected the argument that "only state laws specifically addressed to the airline industry are preempted, whereas the ADA imposes no constraints on laws of general applicability." *Id.* at 386. Such an interpretation, this Court noted, would create "an utterly irrational loophole." *Ibid.* The Court has rejected the same argument in other preemption cases. See, *e.g.*, *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 47-48 (1987) (ERISA preemption is not limited to state measures targeting ERISA plans); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 244 & n.3 (1959)

---

[10] Compare *Industrial Truck Ass'n.* v. *Henry*, 1997 WL 594619, at *4-*12 (9th Cir. Sept. 29, 1997) (holding that Proposition 65 warning requirements are preempted by OSHA without mention of "general/specific" framework), *Brand* v. *Mazda Motor Corp.*, 1997 WL 109976, at *3 (D. Kan. Feb. 12, 1997) (rejecting argument *Medtronic* "impliedly overruled" prior cases relating to preemption under the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. § 30103(b)), and *Lewis* v. *American Cyanamid Co.*, 682 A.2d 724, 730-32 (N.J. Super. Ct. App. Div. 1996) (refusing to apply *Medtronic* to preemption under FIFRA), cert. granted, 697 A.2d 546 (N.J. 1997), with *Harris*, 110 F.3d at 1414 & n.7 (stating that "*Medtronic*'s generality/specificity analysis * * * informs our analysis" of express preemption issues under the National Traffic and Motor Vehicle Safety Act), and *Askenazi* v. *Hymil Mfg. Co.*, 648 N.Y.S.2d 895, 897-98 (N.Y. Sup. Ct. 1996) (applying *Medtronic* to preemption under the Flammable Fabrics Act, 15 U.S.C. § 1203).

(NLRA preemption not limited to state laws "specifically directed towards the governance of industrial relations."). *Medtronic* did not disavow this unbroken line of cases relating to preemption provisions other than that of the MDA.[11]

What is more, the Illinois Supreme Court, in a case decided before *Medtronic*, has squarely rejected the argument that labeling requirements imposed by the FHSA do not give rise to preemption if they "set forth no specific precautions for any specific type of product." *Busch* v. *Graphic Color Corp.*, 662 N.E.2d 397, 406 (Ill.), cert. denied, 117 S. Ct. 55 (1996). The court explained:

> Despite the fact that the provisions are couched in general terms encompassing every type of hazardous substance, they are nonetheless requirements for the cautionary labeling of hazardous substances * * *.

*Ibid.*; see 15 U.S.C. § 1261(p)(1). The Illinois Supreme Court accordingly concluded that the FHSA-imposed labeling requirements trigger preemption even if they are general in nature and apply to a variety of hazardous substances. That conclusion is squarely at odds with the Court of Appeal's holding in this case.

Not only did the Court of Appeal erroneously apply *Medtronic*'s "general/specific" distinction to the FHSA, it applied a distorted version of that distinction. The lower court declared that under *Medtronic* "courts should broadly interpret the preemption provision of federal statutes with limited applicability and narrowly interpret those statutes with general applicability."

---

[11] In *Schuver* v. *E.I. du Pont de Nemours & Co.*, 117 S. Ct. 274 (1996), this Court refused to grant, vacate, and remand for reconsideration in light of *Medtronic* a decision of the Iowa Supreme Court holding that FIFRA preempted certain tort claims brought under state law. The petitioner (who was represented by the same lawyers who handled *Medtronic* for the plaintiffs) unsuccessfully argued that *Medtronic*'s "general/specific" distinction was equally applicable to FIFRA's preemption provision. No. 96-68 Pet. for Cert. 13-14 (filed July 12, 1996). Compare *Papas* v. *Zoecon Corp.*, 505 U.S. 1215 (1992) (granting, vacating and remanding FIFRA case in light of *Cipollone*); *Arkansas-Platte & Gulf Partners* v. *Dow Chem. Co.*, 506 U.S. 910 (1992) (same).

App., *infra*, 9a.[12] But the generality and specificity at issue in *Medtronic* was that of the pertinent state and federal *requirements*, not of the *statutes* as a whole (or even of the *preemption provisions*).

As if that were not enough, the Court of Appeal's interpretive maxim *conflicts* with the majority's position in *Medtronic*. The Court of Appeal evidently derived its canon from Justice Stevens's effort to explain, *on behalf of only four Members of the Court*, why the word "requirement" in the MDA's preemption provision should not be read in precisely the same way as the word "requirement" in the different preemption provision at issue in *Cipollone*. See *Medtronic*, 116 S. Ct. at 2251-52 (plurality). But the other five Justices expressly *disagreed with* Justice Stevens's attempt to distinguish *Cipollone* on that basis. See *id.* at 2262-63 (opinion of O'Connor, J.); *id.* at 2259, 2261-62 (opinion of Breyer, J.).

The Court of Appeal's pervasive confusion stems from its difficulty in understanding and applying this Court's complex, fragmented decisions in *Cipollone* and *Medtronic*. Both of those decisions were rendered by sharply divided Courts, with holdings emerging only from the shifting overlap of multiple opinions. As we previously noted (at page 13), divergent interpretations of *Cipollone* have contributed to conflicts in how the lower courts have interpreted statutes like the FHSA. And, in the case of *Medtronic*, the federal courts of appeals have correctly identified a number of important ambiguities. See *Mitchell* v. *Collagen*, 1997 WL 584550, at *7 (7th Cir. Sept. 23, 1997) (stating that

---

[12] A rule of narrow construction is especially inappropriate in this case because (1) in contrast to the preemption provision at issue in *Medtronic*, the FHSA's preemption provision, which applies only to nonidentical state "cautionary labeling requirements" and only then to state requirements that target the same risk as the federal requirements, is already relatively limited in scope; (2) Congress has included an exemption procedure under which States may obtain permission from the CPSC to avoid preemption, thus removing the primary rationale for the rule of narrow construction (namely, that a "State can do nothing" if preemption is erroneously found, see *Allenby*, 958 F.2d at 943); and (3) Proposition 65 itself envisions that certain of its requirements will be preempted by federal law. See pages 2-4, *supra*.

*Medtronic* "contains several ambiguities" and "presents a difficult situation for an intermediate appellate court"); *Grenier* v. *Vermont Log Bldgs., Inc.*, 96 F.3d 559, 564 (1st Cir. 1996) ("[T]he signals from the Supreme Court are blurred by disagreements within the Court."). To clarify the ambiguities in *Medtronic* and *Cipollone*, and to provide more guidance to businesses and consumers in the important area of preemption law, further review is warranted.[13]

## II. THE ISSUES PRESENTED ARE RECURRING AND OF ENORMOUS PUBLIC IMPORTANCE

The issues raised by this case arise with regularity and are vitally important to the proper administration of federal law.

Even if this case were solely about the scope of preemption under the FHSA, it would merit this Court's attention. The FHSA applies to a wide range of hazardous substances, toys, and other articles intended for use by children. See note 1, *supra*. Many of these individual substances, moreover, are contained in a broad range of consumer products. In 1960, when the FHSA was enacted, proponents of the legislation expected that it would "improve warnings on the labels of over 300,000 common household products." *Burch* v. *Amsterdam Corp.*, 366 A.2d 1079, 1085 (D.C. 1976). Today, the CPSC's regulations mandate additional specific warnings for scores of hazardous substances. See generally 16 C.F.R. §§ 1500.1-.214 (1997).

In view of the FHSA's widespread applicability, it comes as no surprise that issues of preemption under the FHSA arise frequently in the federal and state courts. See cases cited at pages 10-11, 14 & notes 5-6, *supra*. See also, *e.g.*, *Hunnings* v.

---

[13] This Court has asked for the Solicitor General's views in *Kernats by Kernats* v. *Smiths Industries Medical Systems, Inc.*, 669 N.E.2d 1300 (Ill. App. Ct.), appeal denied, 675 N.E.2d 634 (Ill. 1996), pet. for cert. filed, 65 U.S.L.W. 3632 (No. 96-1405). Although *Smiths Industries* presents the question of how *Medtronic*'s preemption analysis should be applied to investigational and premarket-approved medical devices, it is possible that if review is granted, the Court will clarify its decision in *Medtronic* (including aspects of *Medtronic* on which the lower court relied in this case). Thus, although this case warrants plenary review in its own right, it should at a minimum be held if the *Kernats* petition is granted.

*Texaco, Inc.*, 29 F.3d 1480 (11th Cir. 1994); *Toy Mfrs. of America, Inc.* v. *Blumenthal*, 986 F.2d 615 (2d Cir. 1992); *Allenby*, 958 F.2d 737; *Chemical Specialties Mfrs. Ass'n* v. *Clark, Inc.*, 482 F.2d 325 (5th Cir. 1973); *Chemical Specialties Mfrs. Ass'n* v. *Lowery, Inc.*, 452 F.2d 431 (2d Cir. 1971); *Pinckney* v. *Zep Mfg., Co.*, 1997 WL 204903 (N.D.N.Y. Apr. 15, 1997); *Burch*, 366 A.2d 1079; *Moore* v. *B&C Family Ctr., Inc.*, 272 N.W.2d 150 (Mich. Ct. App. 1978).

The significance of this case, however, extends well beyond the question of the scope of FHSA preemption. When Congress enacted the current version of the FHSA preemption clause in 1976, it did so with the avowed purpose of creating "a uniform Federal preemption clause" for the FHSA, the Flammable Fabrics Act (15 U.S.C. § 1203(a)), the Consumer Product Safety Act (*id.* § 2075(a)), and the Poison Prevention Packaging Act (*id.* § 1476(a)). S. Rep. No. 251, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S.C.C.A.N. 993, 996; H.R. Conf. Rep. No. 1022, 94th Cong., 2d Sess. 27-28, *reprinted in* 1977 U.S.C.C.A.N. 1030. In view of Congress's stated objective that these provisions be co-extensive, any interpretation of the FHSA preemption clause is likely to be relevant in cases involving these other statutes as well.

There are many other provisions in the United States Code that specifically preempt nonidentical state "requirements" relating to "labeling." These include not only FIFRA (7 U.S.C. § 136v), which applies to thousands of pesticides and other chemicals and has spawned an enormous body of case law (see pages 11-12, *supra*), but also at least 10 other provisions.[14] Each of these

---

[14] See (1) 15 U.S.C. § 1278 note (preempting state "requirement[s] relating to cautionary labeling" for toys, games, balloons, marbles and other products that present choking hazards to children); (2) *id.* § 1461 (preempting state laws governing "labeling" of certain consumer products); (3) *id.* § 2311(c) (preempting certain state "requirement[s]" that relate to warranties in "labeling"); (4) 21 U.S.C. § 343-1(a) (preempting certain state "requirements" relating to food "labeling"); (5) *id.* § 467e (preempting certain state "requirements" relating to poultry "labeling"); (6) *id.* § 678 (preempting certain state "requirements" relating to meat "labeling"); (7) *id.* § 1052 (preempting certain state "requirements" relating to egg product "labeling"); (8) 42 U.S.C. § 6297(a) (preempting

statutes gives rise to the same issue that is presented in this case: whether a federal law that preempts state "labeling" requirements permits a State to impose warning requirements in point-of-sale signs (or through other channels outside the product's "label"). This issue has in fact arisen under several of these other statutes.[15]

The issues raised by this case extend even beyond cases involving the FHSA, FIFRA, the Consumer Product Safety Act, and the other 12 labeling statutes noted above. The Court of Appeal's reasoning illustrates the widespread confusion in the lower courts about post-*Medtronic* express preemption analysis in general. Specifically, the lower court reached suspect conclusions about (1) the meaning of *Medtronic* and the applicability of its "general/specific" distinction to statutes other than the Medical Device Amendments, 21 U.S.C. § 360k(a); (2) the propriety of an approach under which courts "broadly interpret the preemption

---

certain state "labeling requirements" relating to energy consumption or water use with respect to certain products); (9) *id.* § 6363(e)(1) (preempting certain state labeling requirements concerning containers of recycled oil); (10) *id.* § 14322(e) (preempting certain state "labeling requirement[s]" for rechargeable batteries and rechargeable consumer products). See also 57 Fed. Reg. 38758, 38759 (Aug. 27, 1992) (Department of Agriculture regulation preempting state "labeling requirements" concerning animal vaccines).

[15] See, *e.g.*, *Moe* v. *MTD Prods., Inc.*, 73 F.3d 179, 182-83 (8th Cir. 1995) (holding state common law failure-to-warn claim based on deficiency in federal labeling preempted under Consumer Product Safety Act, 15 U.S.C. § 2075(a)); *Cortez* v. *MTD Prods., Inc.*, 927 F. Supp. 386, 391 (N.D. Cal. 1996) (same) ("permitting plaintiff to recover on his failure to warn theory would upset the careful balancing of interests that Congress, through the [CPSC], sought to achieve when it prescribed the warning label regulations" for lawn mowers); *Lacey* v. *Lorillard Tobacco Co.*, 956 F. Supp. 956, 962-64 (N.D. Ala. 1997) (holding common-law failure to warn claim preempted by Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340). See also *Lynnbrook Farms* v. *Smithkline Beecham Corp.*, 79 F.3d 620, 625, 629-30 (7th Cir.) (state common law claims preempted by Department of Agriculture regulation preempting state "labeling requirements" relating to animal vaccines), cert. denied, 117 S.Ct. 178 (1996).

provision of federal statutes with limited applicability and narrowly interpret those statutes with general applicability" (App., *infra*, 9a); (3) the appropriateness of applying the facial challenge standard to a preemption defense asserted in an enforcement action; and (4) the extent to which preemption cases involving common law claims are inapplicable to statutory preemption cases. Each of these holdings has broad relevance to a wide array of express preemption cases.

The Court of Appeal's far-reaching pronouncements are especially troubling (and deserving of this Court's review) because, under California law, they must be followed by every trial court in the State. See *Auto Equity Sales, Inc.* v. *Superior Court of Santa Clara County*, 369 P.2d 937, 940 (Cal. 1962). Unless corrected by this Court, the Court of Appeal's reasoning and analysis thus may go far in undermining the preemption defense in actions brought in the California courts.

Moreover, this case is important because it involves Proposition 65. Proposition 65 is a highly controversial experiment in citizen-imposed warning requirements at the state level. See Rechtschaffen, *The Warning Game: Evaluating Warnings Under California's Proposition 65*, 23 ECOLOGY L.Q. 303, 305 (1996) ("The statute has received extraordinary national attention * * * and has been alternatively labeled revolutionary and wildly irresponsible.") (footnotes omitted). Applicable throughout the most populous State in the Union, the statute now covers 433 substances classified by California as carcinogens and another 187 substances classified as reproductive toxins. See Letters Desk, L.A. Times, Sept. 8, 1997, at B4 (letter from Cal. EPA official). Many of these substances (including their labels and labeling) are already regulated by the federal government pursuant to FHSA, FIFRA and other preemptive federal regimes. Environmental activists have pushed for legislation modeled after Proposition 65 in other states. See, e.g., An Act Entitled The "Massachusetts Citizens' Right To Know Act," 1997 MA S.B. 488 (Jan. 1, 1997) (available in LEXIS).

Finally, the logic of the Court of Appeal's decision, if followed by other courts, could eviscerate the FHSA preemption provision and impair the CPSC's regulatory authority. The lower

court's suggestion that "general" requirements are not preemptive (or preempted) would severely impair the FHSA preemption provision, because (as the Illinois Supreme Court has correctly observed), most of the "cautionary labeling requirements" prescribed directly by the FHSA apply generally to a range of substances. See pages 19, 29-30, *infra*; *Busch*, 662 N.E.2d at 406. At the same time, the Court of Appeal's cramped reading of the statutory term "directions for use" will, if followed in other cases, have the undesirable effect of limiting the range of "labeling" over which the CPSC may exercise regulatory authority.

## III. THE COURT OF APPEAL'S DECISION IS MANIFESTLY INCORRECT

The decision below is manifestly erroneous. Indeed, several of the errors described above — such as the Court of Appeal's misapplication of the standard for facial challenges to this enforcement action, its derivation from *Medtronic* of the "rule" that broad preemption provisions must be interpreted narrowly and narrow provisions broadly, and its remarkable suggestion that common law preemption cases are irrelevant to cases involving the preemption defense in statutory enforcement actions — are, for reasons already explained, so egregiously mistaken that they may warrant summary reversal. And there are many other important flaws in the Court of Appeal's analysis, of which we will address only a few here.

1. *The Court Of Appeal Failed To Grasp That State-Imposed Warning Requirements Are Necessarily Premised Upon A Perceived Deficiency In The Product's Federally Required "Label" And Thus Are Expressly Preempted By The FHSA*. Contrary to the Court of Appeal's conclusion, the FHSA does not preempt only those warnings and other cautionary statements that state law requires to be *included in* a product's "labeling." Instead, the reference to state "cautionary labeling requirements" should be understood to encompass any requirement to make cautionary statements that is triggered by some perceived deficiency in the product's "label" or "labeling." There is ample support in the legislative history of the FHSA for this common-sense interpretation. See H.R. Rep. No. 325, 94th Cong., 1st Sess. 22 (1975) (stating that "[u]nder existing law, section 18 of the Federal Hazardous Substances Act preempts all differing state laws *pertaining to* precautionary labeling of

hazardous substances") (emphasis added). There also is support for that interpretation in this Court's decision in *Cipollone* and in numerous federal decisions concerning FIFRA's preemption of common law failure-to-warn claims. See pages 11-12, *supra*.[16]

The approach taken by the Court of Appeal would permit the States easily to circumvent the FHSA's preemptive command through requirements to post signs at the point of sale, send letters or make phone calls to customers, or run television commercials or newspaper ads. Under the Court of Appeal's view, the imposition of state cautionary requirements through these means could escape preemption entirely, and States would be free not only to second-guess the federal regulator's judgment concerning what warnings are necessary to protect the public health but also to impose undesirable burdens on interstate commerce. The statements mandated by States through alternative media could even make direct reference to the product's label, or contradict the warnings in that label, without being preempted. That cannot be the law.

2. *Even If The FHSA Only Preempts State Requirements To Provide Warnings In "Cautionary Labeling," That Term Includes Point-Of-Sale Signs*. The FHSA, by its terms, preempts state "cautionary labeling requirements" that are "applicable to" either the product's "packaging" or the hazardous "substance" itself. Plainly, the warnings contained in a point-of-sale sign are "applicable to" the substance discussed by the warnings and constitute "cautionary" messages. Under the Court of Appeal's approach, the only remaining issue is whether the point-of-sale signs in which the warnings must be placed qualify as "labeling" under the FHSA. For at least two reasons, such signs do qualify as "labeling."

a. The FHSA does not define the term "labeling," but it does define the term "label." See note 3, *supra*. The FHSA provision that defines "label" as "a display of written, printed, or graphic

---

[16] The Court of Appeal stated that "an enforcement action never requires the court to assess the adequacy of the label." App., *infra*, 21a. But that is simply untrue. Unless the labels affixed to petitioner's products fail to satisfy Proposition 65, there is no valid basis for this enforcement action or for the civil penalties imposed in this case.

matter upon the immediate container of any substance" also makes clear that any warning or disclosure "requirement" under FHSA that must be included in the "label" must also appear "on all *accompanying literature* where there are *directions for use*, written or otherwise." 15 U.S.C. § 1261(n) (emphasis added). Without explanation, the Court of Appeal assumed that "accompanying literature" containing "directions for use" was part of the definition of FHSA "labeling." And since the CPSC's regulations make clear that "accompanying literature" includes point-of-sale signs (see note 3, *supra*), the only remaining question for preemption purposes was whether the Proposition 65 warnings provided "directions for use" within the meaning of the statute.

In answering that question in the negative, the Court of Appeal incorrectly disregarded the CPSC's expert interpretation of the statute. According to the CPSC, although a "warning that a product can cause cancer or birth defects is not an express direction for use," it nevertheless "conveys the information that, in using the product, steps should be taken to minimize or eliminate exposure." Advisory Opinion No. 312, at 3 (Mar. 6, 1991). The Commission explained (*id.* at 3-4):

> Stated another way, the warning itself can also serve as a direction for use. * * * Thus, for example, a product having flammable vapors might have a statement of principal hazard, such as "FLAMMABLE," that could serve also as the required statement of action to be avoided, which, if stated separately, might read "do not use near open flame." Similarly, the statement of principal hazard "HARMFUL IF SWALLOWED" could negate the need to state additionally "for external use only." Also, the statement "VAPOR HARMFUL" could also serve instead of an additional statement to "avoid prolonged inhalation of vapors."

Thus, even warnings that "do[ ] not necessarily convey specific actions to be taken in the use of the product" can "convey information about how the product should be used (steps should be taken to reduce exposure)"; and "[i]t follows" that signs containing such warnings are "labeling under FHSA [section] 2(n)." *Ibid.* The Court of Appeal erred in refusing to give deference to this eminently reasonable agency interpretation.

b. Point-of-sale signs constitute "labeling" for another reason. Although the FHSA does not define that term, it is a well-established concept under federal law. Since 1938, the Food, Drug & Cosmetic Act (FDCA) has defined "labeling" broadly to include "all labels and other written, printed, or other graphic matter (1) upon any article or any of its containers or wrappers, or (2) *accompanying such article*." 21 U.S.C. § 321(m) (emphasis added). See generally *Kordel* v. *United States*, 335 U.S. 345, 347-50 (1948) (discussing breadth of "labeling" under FDCA). That definition of "labeling" should be compared with the much narrower definition of "label" under the FDCA, which is essentially identical to the FHSA's definition of "label."[17] In the absence of a statutory definition of "labeling" in the FHSA, the Court of Appeal should have looked to the settled meaning of that term of art in these other federal-law contexts. The FHSA's definition of the more restrictive term "label" is obviously patterned after the definition of that term in the FDCA and FIFRA, making it particularly sensible to look to those statutes for the meaning of the broader companion term "labeling."

Moreover, the CPSC (and before it the FDA, which administered the FHSA before 1976) have interpreted the FHSA preemption provision broadly to encompass not only state requirements that prescribe the precise content of "labeling" *but also their functional equivalent*. According to a regulation adopted by both agencies and in force for more than a decade:

> Federal preemption applies to any labeling requirement intended *to serve as* or be a part of, *or is in the nature of*, precautionary labeling. Precautionary labeling includes such

---

[17] See FDCA, 21 U.S.C. § 321(k) ("The term 'label' means a display of written, printed, or graphic matter upon the immediate container of any article * * *."); FHSA, 15 U.S.C. § 1261(n) ("The term 'label' means a display of written, printed, or graphic matter upon the immediate container of any substance * * *."). Compare also 7 U.S.C. § 136(p)(1) (defining "label" under FIFRA as "the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers") with *id.* § 136(p)(2) (defining "labeling" under FIFRA as including "all labels and all other written, printed, or graphic matter — (A) *accompanying the pesticide or device at any time*") (emphasis added).

> information as warnings, * * * disclosure of hazards, antidote information, * * * and other similar labeling requirements.

21 C.F.R. § 191.4 (1973) (quoted in 37 Fed. Reg. 18628, 18629 (Sept. 13, 1972)) (emphasis added); 16 C.F.R. § 1500.7 (1974) (quoted in 38 Fed. Reg. 27012, 27016 (Sept. 27, 1973)) (emphasis added).[18] Thus, the CPSC was long on record that *all* state requirements targeting the same risk that "serve as" or are "in the nature of" precautionary labeling are preempted, regardless of whether they mandate the inclusion of statements in product "labeling." The Court of Appeal failed to consider this long-standing agency interpretation.

3. *The Court Of Appeal Erroneously Applied To The FHSA The "General/Specific" Distinction Set Forth In* Medtronic. The Court of Appeal evidently failed to grasp that the *holding* of *Medtronic* largely rested on how the unique language of the MDA's preemption provision had been *interpreted by the FDA*. The majority in *Medtronic* stated that its "interpretation of the pre-emption statute is substantially informed" by the "FDA regulations interpreting the scope of § 360k's pre-emptive effect." 116 S. Ct. at 2255; see also *id.* at 2260-61 (Breyer, J.) (same). "[T]he critical importance of device-specificity in [the plurality's] (and the FDA's) construction of § 360k," *id.* at 2259, which formed the basis for the Court's decision, was derived from the FDA's regulation interpreting the statute. There is no similar interpretation of FHSA's preemption clause by the CPSC that endorses the "general/specific" gloss placed on that statute by the Court of Appeal. Indeed, the CPSC's interpretation of the FHSA suggests that the cautionary requirements imposed pursuant to Proposition 65 in this case are preempted.

The "general/specific" distinction is especially inapposite to the FHSA because, as explained above (at pages 19, 24-25), many

---

[18] This regulation was revoked in 1982 only because aspects of it — in particular, its statement that "Federal preemption does not apply to a State or local *ban* on a household product" (16 C.F.R. § 1500.7(d) (1974) (emphasis added)) — "became incompatible with" changes made to the FHSA preemption provision in 1976. See 47 Fed. Reg. 57489 (Dec. 27, 1982).

of the warnings and cautionary statements mandated by the statute itself apply to large numbers of hazardous substances. See, *e.g.*, 15 U.S.C. § 1261(p)(1)(C) (requiring the signal word "DANGER" in labeling of all hazardous substances that are "extremely flammable, corrosive, or highly toxic"). Yet there can be no serious doubt that such warnings constitute "cautionary labeling requirements under section [1261(p)]," which trigger preemption under the FHSA's preemption provision. 15 U.S.C. § 1261 note. Moreover, the Court of Appeal's conclusion that "a general warning for a variety of products" does not trigger preemption (App., *infra*, 13a) would deprive even specific warnings relating to a single hazardous substance of preemptive force, because many such substances are a component of multiple "products." And finally, the Court of Appeal's conclusion that the federal requirements in this case are "general" overlooks the toluene-specific warnings mandated in this case by the CPSC. See page 3, *supra*.

4. *The Court Of Appeal's Decision Leads To Absurd Results*. The Court of Appeal's analysis defies common sense. In the Court of Appeal's view, a state requirement to post point-of-sale signs that include warnings concerning a hazardous substance (and targeting the same risk as a federally mandated product warning) is preempted by the FHSA only if the signs contain "directions for use." But there is absolutely no reason — and certainly none suggested by the Court of Appeal — why Congress would have intended to draw such an irrational distinction.

Under the Court of Appeal's analysis, a sign consisting of a single prominent warning ("**GASES HARMFUL**") *would not* be preempted whereas another sign bearing the same warning (in much smaller and less conspicuous typeface) *would* be preempted if it also contained at the bottom in minuscule typescript the statement: "Use product only in temperatures of less than 120 degrees Fahrenheit." Yet the interference with the agency's expert assessment about what warnings are needed is, if anything, greater with respect to the first sign, because the mandated warning is more prominent. When all is said and done, there is no reason why the inclusion of "directions for use" (in the constrictive sense that the Court of Appeals understood that term) should be decisive in determining whether state cautionary requirements are preempted.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. MCGRADY, JR.
*TruServ Corporation*
*8600 West Bryn Mawr Ave.*
*Chicago, IL 60631*
*(773) 695-5451*

JEFFREY B. MARGULIES
*Haight, Brown & Bonesteel L.L.P.*
*1620 26th Street*
*Suite 4000 North*
*Santa Monica, CA 90404*
*(310) 449-6000*

KENNETH S. GELLER
ROY T. ENGLERT, JR.
ALAN E. UNTEREINER*
*Mayer, Brown & Platt*
*2000 Pennsylvania Ave., N.W.*
*Washington, D.C. 20006*
*(202) 463-2000*

**Counsel of Record*

OCTOBER 1997

# APPENDICES

## APPENDIX A

The PEOPLE ex rel. Daniel E. LUNGREN, as Attorney General, etc., Plaintiff and Respondent,
v.
COTTER & COMPANY, Defendant and Appellant;
As You Sow, Intervener and Respondent.

No. A070904.

Court of Appeal, First District, Division 2, California.

March 31, 1997.

Haight, Brown & Bonesteel Jeffrey B. Margulies, Santa Monica, for Defendant and Appellant.

Thomas J. Graves, Charlottesville, VA, McDermott, Will & Emery, Nathalie F.P. Gilfoyle, Washington, DC, Thomas A. Ryan, Los Angeles, Amici Curiae on behalf of Defendant and Appellant.

Daniel E. Lungren, Attorney General of the State of California, Roderick E. Walston, Chief Assistant Attorney General, Theodora Berger, Assistant Attorney General, Craig Thompson, Supervising Deputy Attorney General, Edward G. Weil, Susan S. Fiering, Deputy Attorneys General, for Plaintiff and Respondent.

Clifford A. Chanler, Mark Todres, Jenny Cohn, Chanler & Somers, Intervener and Respondent.

LAMBDEN, Associate Justice.

Cotter & Company (Cotter) appeals the trial court's denial of its summary judgment motion and the granting of the People's cross motion for summary adjudication as to Cotter's affirmative defense alleging preemption. Cotter contends the Federal Hazardous Substances Act (FHSA) preempts California's Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65). We find the FHSA does not preempt the warning requirements of Proposition 65 and affirm.

## BACKGROUND

As You Sow (AYS), a nonprofit organization, investigates and sometimes litigates possible Proposition 65[1] violations. Health and Safety Code[2] section 25249.6 requires warnings for products causing cancer or reproductive toxicity. Toluene is a reproductive toxin which requires a warning pursuant to Proposition 65.[3]

On December 10, 1992, AYS sent a 60 day notice pursuant to section 25249.7 to the Attorney General of the State of California alleging that Cotter and three other paint and coatings manufacturers failed to provide warnings of toluene exposure in violation of Proposition 65.[4] Cotter is a national member owned cooperative with 300 to 500 True Value Hardware stores in California.

On September 17, 1993, the Attorney General filed a suit against Cotter and three other companies[5] alleging they violated Proposition

---

[1] Health and Safety Code section 25249.5 et seq., which became effective January 1, 1987, codifies Proposition 65.

[2] Unless otherwise designated, all code sections refer to the Health and Safety Code.

[3] Toluene became listed as a reproductive toxin on January 1, 1991 (Cal. Code Regs., tit. 22, § 12000), and warnings became required pursuant to section 25249.10, subdivision (b), as of January 1, 1992.

[4] Proposition 65 provides for citizen enforcement of the statute. Section 25249.7, subdivision (d), states: "Actions pursuant to this section may be brought by any person in the public interest if (1) the action is commenced more than sixty days after the person has given notice of the violation which is the subject of the action to the Attorney General and the district attorney and any city attorney in whose jurisdiction the violation is alleged to occur and to the alleged violator, and (2) neither the Attorney General nor any district attorney nor any city attorney or prosecutor has commenced and is diligently prosecuting an action against such violation."

[5] The three other companies settled with the People and agreed to the entry of consent judgments which ordered them to comply with Proposition 65 and pay penalties and restitution.

65 and the Business and Professions Code section 17200 et seq. On July 23, 1994, Cotter and the People entered into a Permanent Injunction Pursuant to Stipulation requiring Cotter to take certain steps to provide warnings for its paint products.

Cotter filed a motion for summary judgment alleging Proposition 65's regulations involved "cautionary labeling requirements" as defined by the FHSA. Consequently, Cotter argued, federal law has preempted Proposition 65. In addition, Cotter alleged it could only comply with Proposition 65 by labeling its products; therefore Proposition 65 constituted a de facto labeling requirement. The People responded by filing opposition to Cotter's motion and a cross motion for summary adjudication to Cotter's fifth affirmative defense, which alleged preemption of Proposition 65 by the FHSA. On March 9, 1993, the court denied summary judgment to Cotter and granted summary adjudication to the People on the fifth affirmative defense.

Cotter and the People entered into a consent judgment on June 9, 1995, resolving the litigation and requiring Cotter to pay $275,000 as penalties and restitution for the Proposition 65 violations. The consent judgment permitted Cotter to appeal from the order on preemption.

### *Statutory Background*

#### *Proposition 65*

Proposition 65 states, in part: "No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual...." (§ 25249.6.) Twelve months after the statute designates a substance as toxic, products containing the listed toxic substance must have warnings about the health risks. (§ 25249.10, subd. (b).)

The statute does not define "warning," but explains: "'Warning' within the meaning of Section 25249.6 need not be provided separately to each exposed individual and may be provided by general methods such as labels on consumer products, inclusion of notices in mailings to water customers, posting of notices, placing notices in public news media, and the like, provided that the

warning accomplished is clear and reasonable." (§ 25249.11, subd. (f).) The regulations describe four types of "safe harbor" warnings for consumer products: product labeling, "shelf labeling, signs, menus, or a combination thereof." (Cal. Code Regs., tit. 22, § 12601, subd. (b)(1)(B).)

The warnings must be "prominently placed upon a product's label or other labeling or displayed at the retail outlet with such conspicuousness, as compared with other words, statements, designs, or devices in the label, labeling or display as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use." (Cal. Code Regs., tit. 22, § 12601, subd. (b)(3).) Thus, a merchant can comply with Proposition 65 by posting a sign stating the products are known to the state to cause cancer and/or are reproductively toxic.

***The FHSA***

Congress enacted the FHSA in 1960 and the Act itself does not contain a section stating its purpose. (See *Lee* v. *Boyle-Midway Household Products, Inc.* (W.D. Pa.1992) 792 F. Supp. 1001, 1008.) However, the House Committee on Interstate and Foreign Commerce stated, "The purpose of this bill is to provide nationally uniform requirements for adequate cautionary labeling of packages of hazardous substances which are sold in interstate commerce and are intended or suitable for household use." (*Id.*, *quoting* H.R. Rep. No. 1861, 86th Cong., 2d Sess. 1 (1960), reprinted in 1960 U.S. Code Cong. & Admin. News, No. 2, p. 2833.)

In 1966, Congress added a limited preemption provision to protect manufacturers from having to create different labels to comply with varying state regulations. It modified the preemption provision in 1976 to state: "'Except as provided in paragraphs (2) and (3), if a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) [subsec. (p) of this section or section 1262(b) of this title] designed to protect against a risk of illness or injury associated with the substance, no State or political subdivision of a State may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under section

2(p) or 3(b) [subsec. (p) of this section or section 1262(b) of this title].'" (15 U.S.C. § 1261 note (b)(1)(A) (hereinafter 15 U.S.C. § 1261 note).)

Although the FHSA does not define "cautionary label," it does define label as the following: "The term 'label' means a display of written, printed, or graphic matter upon the immediate container of any substance or, in the case of an article which is unpackaged or is not packaged in an immediate container intended or suitable for delivery to the ultimate consumer, a display of such matter directly upon the article involved or upon a tag or other suitable material affixed thereto; and a requirement made by or under authority of this chapter that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears (1) on the outside container or wrapper, if any there be, unless it is easily legible through the outside container or wrapper and (2) on all accompanying literature where there are directions for use, written or otherwise." (15 U.S.C. § 1261(n).)

## DISCUSSION

Cotter raises two issues on appeal: (1) Does the FHSA preempt Proposition 65 warnings because point of sale signs are labels as defined by the FHSA? (2) If point of sale signs are not labels, does the FHSA still preempt Proposition 65 because the state statute imposes a de facto labeling requirement? We address each of these issues separately.

### *I. Point of Sale Signs Are Not Labels Under the FHSA*

Cotter contends the court erred in denying its summary judgment motion because Proposition 65 imposes a "cautionary labeling requirement" which is preempted by the FHSA. Since Cotter presents a facial challenge to Proposition 65, it must establish Proposition 65 would not be valid under any set of circumstances. (*Chemical Specialties Mfrs. Ass'n, Inc.* v. *Allenby* (9th Cir.1992) 958 F.2d 941, 943, *cert. den.* (1992) 506 U.S. 825, 113 S.Ct. 80, 121 L.Ed.2d 44 (*Allenby*).) Thus, to find preemption, we "'must determine that all possible consumer product warnings that would satisfy Proposition 65 conflict with provisions'" of the FHSA.

(*Comm. of Dental Amalgam Mfrs. & Distribs.* v. *Stratton* (9th Cir.1996) 92 F.3d 807, 810 (*Stratton*).)

The People claim Cotter could satisfy Proposition 65 by using point of sale signs. This method, they assert, does not conflict with the preemption provision of the FHSA. They rely on *Allenby*, *supra*, 958 F.2d 941, which held such signs are not labels under the FHSA. Cotter, however, claims the Ninth Circuit in *Allenby* misapplied and misinterpreted federal and state law and the trial court erred by following *Allenby*.

In deciding whether *Allenby* represents good law, we first review the federal preemption doctrine and examine the most recent United States Supreme Court decisions. We then explain why *Allenby* correctly found point of sale signs are not labels under the FHSA.

***A. Standard of Review***

The trial court denied Cotter's motion for summary judgment based on preemption and granted the People's motion for summary adjudication to Cotter's defense of preemption. Summary adjudication was proper only if the defense of preemption presented no triable issue of material fact and Cotter could not raise the defense as a matter of law. (Code Civ. Proc., § 437c, subd. (f)(1).) Since the parties do not dispute the facts related to preemption and the summary adjudication raises a purely legal question, we employ de novo review. (*Schrader* v. *Scott* (1992) 8 Cal. App.4th 1679, 1684, 11 Cal.Rptr.2d 433.)

***B. Preemption Doctrine***

"Preemption analysis starts with the presumption that the traditional police powers of states are not displaced by federal law unless displacement was the 'clear and manifest purpose of Congress.'" (*Allenby*, *supra*, 958 F.2d 941, 943. *Accord* with *Medtronic, Inc.* v. *Lohr* (1996) — U.S. —, —, 116 S.Ct. 2240, 2248, 135 L.Ed.2d 700 (*Medtronic*).)[6] One reason for this

---

[6] Justice Stevens delivered the opinion of the court. Justices Kennedy, Souter, Ginsburg, and Breyer joined with respect to pages 2245-2251 (Parts I, II, and III); pages 2253-2258 (Part V); and page 2259 (Part VII). Justices Kennedy, Souter, and Ginsburg joined with respect to pages

presumption is Congress has the power to make its intention clear. "[I]f the court erroneously finds preemption, the State can do nothing about it, while if the court errs in the other direction, Congress can correct the problem." (*Ibid.*)

The second presumption underlying a preemption analysis requires a determination of Congress's purpose, which "'is the ultimate touchstone' in every pre-emption case. [Citations.]" (*Medtronic*, supra, — U.S. ——, ——, 116 S.Ct. 2240, 2250.) We determine intent primarily "from the language of the pre-emption statute and the 'statutory framework' surrounding it. [Citation.]" (*Id.* at p. ——, 116 S.Ct. at p. 2251.) "Also relevant, however, is the 'structure and purpose of the statute as a whole,' [citation], as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." (*Ibid.*)

If the statute does not have an express preemption clause, state law is only preempted if (1) the law actually conflicts with federal law, or (2) federal law so thoroughly occupies a legislative field "'as to make reasonable the inference that Congress left no room for the States to supplement it.' [Citation.]" (*Cipollone* v. *Liggett Group, Inc.* (1992) 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (*Cipollone*).) "When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority' [citation], 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation. [Citation.]" (*Id.* at p. 517, 112 S.Ct. at p. 2618.)

In this case, Congress enacted an express preemption clause and we only need to "identify the domain expressly pre-empted." (*See Cipollone*, *supra*, 505 U.S. 504, 517, 112 S.Ct. 2608, 2618.)

---

2251-2253 (Part IV) and pages 2258-2259 (Part VI). Justice Breyer filed an opinion concurring in part and concurring in the judgment. Justice O'Connor filed an opinion concurring in part and dissenting in part, in which Justices Rehnquist, Scalia, and Thomas joined. All references, unless otherwise specified, refer to Justice Stevens's opinion.

Moreover, we must narrowly read the preemption clause because Proposition 65 is an instance of the state exercising its police power. (*Medtronic*, *supra*, — U.S. —, —, 116 S.Ct. 2240, 2250; *Ketchum* v. *Hyundai Motor Co.* (1996) 49 Cal. App. 4th 1672, 1678, 57 Cal. Rptr. 2d 595.)

***C. Cipollone and Medtronic***

The two most recent United States Supreme Court cases to consider preemption are *Cipollone*, *supra*, 505 U.S. 504, 112 S.Ct. 2608 and *Medtronic*, *supra*, — U.S. —, 116 S.Ct. 2240. Both the People and Cotter contend *Cipollone* supports their position. The Supreme Court decided *Medtronic* while this appeal was pending, and both parties discussed its impact on this appeal at oral argument.

In *Cipollone*, *supra*, the United States Supreme Court found the amended Public Health Cigarette Smoking Act of 1969 (Smoking Act) preempted common law claims based on a failure to warn about the hazards of smoking, but not those premised on express warranty, intentional fraud and misrepresentation, or conspiracy. (505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407.) The federal statute set forth the exact warning to be placed on each package[7] and the preemption clause specified "'[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.'" (*Id.* at p. 515, 112 S.Ct. at p. 2617.)

When determining whether federal law expressly preempted the common law claims, the court in *Cipollone*, *supra*, held the following as the central inquiry: "[W]e ask whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health ... imposed under State law with respect to ... advertising or promotion,' giving that clause a fair but narrow reading." (505

---

[7] The Smoking Act required the following warning: "'WARNING: THE SURGEON GENERAL HAS DETERMINED THAT CIGARETTE SMOKING IS DANGEROUS TO YOUR HEALTH.'" (*Cipollone*, *supra*, 505 U.S. at p. 508, 112 S.Ct. at p. 2613.)

U.S. 504, 524, 112 S.Ct. 2608, 2621, 120 L.Ed.2d 407.) Thus, federal law preempted state claims based on inadequate warnings about health risks.

The United States Supreme Court further refined preemption analysis in *Medtronic*, *supra*, — U.S. —, 116 S.Ct. 2240. In Medtronic, the manufacturer of a pacemaker argued the Medical Device Amendments of 1976 (MDA) to the federal Food, Drug and Cosmetics Act governed the requirements for medical devices and its preemption clause prevented the plaintiff's claims of negligence and strict liability based on a defective device and inadequate warnings. (*Id.* at p. —, 116 S.Ct. at p. 2250.) The preemption provision under the MDA provided: "[N]o State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement — [¶] (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and [¶] (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter." (21 U.S.C. § 360k(a).)

The court in *Medtronic* stated courts should broadly interpret the preemption provision of federal statutes with limited applicability and narrowly interpret those statutes with general applicability. Accordingly, the court in *Cipollone* broadly interpreted the word "requirement" in the preemption provision because: "The pre-emptive statute in *Cipollone* was targeted at a limited set of state requirements — those 'based on smoking and health' — and then only at a limited subset of the possible applications of those requirements — those involving the 'advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of' the federal statute. [Citation.]" (*Medtronic*, *supra*, — U.S. —, —, 116 S.Ct. 2240, 2252 fn. omitted.)

In contrast to the Smoking Act, the MDA in *Medtronic* applied to all medical devices, warranting a narrow interpretation of "requirement." The court defined "requirement" under the MDA to include only those situations in which the state and federal government had imposed a conflicting "duty" on the manufacturer. (*Medtronic*, *supra*, — U.S. —, —, 116 S.Ct. 2240, 2251.) The FDA approved the marketing of the pacemaker in *Medtronic*

because it was "'substantially equivalent' to devices already on the market," and had not specifically evaluated the pacemaker. (*Id.* at p. ----, 116 S.Ct. at p. 2248.) Accordingly, the court found the MDA had not issued "any requirement" applicable to this device and it did not preempt the state claim alleging negligent design. (*Id.* at p. ----, 116 S.Ct. at p. 2249.)

The court in *Medtronic* also held the MDA did not preempt claims based on inadequate labeling. The MDA required manufacturers of every medical device to include a label containing "'information for use, ... and any relevant hazards, contraindications, side effects, and precautions.' [Citation.]" (*Medtronic*, *supra*, --- U.S. ----, ----, 116 S.Ct. 2240, 2256.) The labeling requirements did not apply specifically to the pacemaker; therefore, the court found the federal government had not imposed a labeling "requirement" for the pacemaker.

The court explained why a decision regarding preemption should consider the "generality" of the federal statute: "The generality of those requirements make [sic] this quite unlike a case in which the Federal Government has weighed the competing interests relevant to the particular requirement in question, reached an unambiguous conclusion about how those competing considerations should be resolved in a particular case or set of cases, and implemented that conclusion via a specific mandate on manufacturers or producers." (*Medtronic*, *supra*, --- U.S. ----, ----, 116 S.Ct. 2240, 2258.) Instead, "the federal requirements reflect important but entirely generic concerns about device regulation generally, not the sort of concerns regarding a specific device or field of device regulation which the statute or regulations were designed to protect from potentially contradictory state requirements." (*Ibid.*)

When both the state and federal requirements reflect "generic concerns" rather than specific regulations, they probably will not conflict, resulting in no preemption. (*Medtronic*, *supra*, --- U.S. ----, ----, 116 S.Ct. 2240, 2258.) Preemption occurs "only where a particular state requirement threatens to interfere with a specific federal interest." (*Id.* at p. ----, 116 S.Ct. at p. 2257.)

### *D. The FHSA, Proposition 65, and Preemption*

Only one case, *Allenby*, *supra*, has reviewed preemption under the FHSA and Proposition 65. (958 F.2d 941.) It held the FHSA did not preempt Proposition 65.[8]

Cotter argues *Allenby* does not represent good law because it conflicts with the holding in *Cipollone*, contradicts other state and federal decisions made post-*Cipollone*, and ignored and failed to defer to the conclusions of the Consumer Product Safety Commission (CPSC). To support its contention, Cotter cites one other Proposition 65 case in the district court (*Committee of Dental Amalgam Alloy Mfrs.* v. *Henry* (S.D. Cal.1994) 871 F. Supp. 1278), which was recently reversed in *Stratton*, *supra*, 92 F.3d 807, and tort claims preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

Prior to assessing each of Cotter's criticisms of *Allenby*, we briefly summarize *Allenby's* analysis of preemption under the FHSA and conduct our own independent analysis of preemption and the FHSA.

#### *1. Allenby*

When analyzing preemption under the FHSA, the court in *Allenby*, *supra*, 958 F.2d 941, 946 noted the preemption provision in the FHSA only applies to "cautionary labels" on packages (15 U.S.C. § 1261 note). The Act defines labels as including accompanying literature only if the material contains "directions for use." (15 U.S.C. § 1261(n).) Thus, if point of sale signs were not "directions for use," they represented a method in which a manufacturer could satisfy Proposition 65 without requiring warning labels in addition to the FHSA.

The court rejected the argument that Proposition 65 warnings "impliedly" direct the consumer to handle the product to "avoid or minimize direct exposure" and were therefore directions for use. (*Allenby*, *supra*, 958 F.2d 941, 949.) The court explained this was a "nonsensical reading" of the term "directions for use" and it

---

[8] *Allenby* also found Proposition 65 was not preempted by the Federal Insecticide, Fungicide and Rodenticide Act.

agreed with the lower court's comments during oral argument about a sign stating, "'this product may cause birth defects.'" The Ninth Circuit quoted the lower court as responding: "'[D]oesn't tell you whether it's going to cause defects if you pour it on your feet, or if you drink it, or if you poke it in your ear, it just says that it may cause birth defects. How is that a direction for use?'" (*Ibid.*) Instead, the court in *Allenby* determined Congress's intent more likely related to "how much of a detergent to use, or how long a paint solvent should be mixed."[9] (*Ibid.*)

The court in *Allenby* concluded Proposition 65 did not frustrate any congressional purpose. The FHSA regulates cautionary labeling to promote uniformity but permits the states through the use of point of sale signs to regulate the sale and use of hazardous chemicals. (*Allenby*, *supra*, 958 F.2d 941, 950.)

***2. Allenby's analysis of labels under the FHSA remains good law post-Cipollone***

***(i) Predicate duty analysis does not apply to general statutes***

Cotter argues *Allenby* is not good law because (*Cipollone*, *supra*, 505 U.S. 504, 524, 112 S.Ct. 2608, 2621) held the central inquiry for preemption is whether the state and federal statutes have the same predicate duty. Cotter contends Proposition 65 and the FHSA have the same "predicate duty": the legal duty to warn of toxic dangers.

Cotter, however, does not consider the recent decision of *Medtronic*, *supra*, which explained the predicate duty analysis does

---

[9] *Allenby*, *supra*, also found no preemption because the warnings required under Proposition 65 were not "necessarily nonidentical" to the requirements under the FHSA. (958 F.2d at p. 950.) Since neither statute required specific language, a manufacturer could choose to use a label which satisfied both Proposition 65 and the FHSA. However, after *Cipollone*, once Congress has enacted a preemption amendment, the issue is not whether the warnings can never be the same, but whether the warnings are identical. The requirements under Proposition 65 are clearly not identical to the warnings under the FHSA. Thus, we disagree with the holding in *Allenby* to the extent it found no preemption on this basis.

not apply when the federal statute merely requires a general duty to inform users and purchasers of potentially dangerous items. (--- U.S. ---, ---, 116 S.Ct. 2240, 2258, 135 L.Ed.2d 700.) When the predicate for the plaintiff's claims is the general duty to inform users and purchasers of potentially dangerous items and the federal government has not implemented or enforced specific federal requirements, general obligations imposed by the state do not threaten the federal requirements. (*Ibid.*)

Indeed a recent Ninth Circuit opinion, relying on the analysis of *Medtronic*, held the MDA does not preempt Proposition 65 warnings[10] for dental amalgam.[11] (*Stratton*, *supra*, 92 F.3d 807, 810.) "Proposition 65 is a state law of general applicability which was not enacted 'with respect to' medical devices." (*Id.* at p. 813.) Rather, "Proposition 65 applies to all products and services that pose a health risk to the public." (*Ibid.*) The court concluded: "Thus, we hold that the consumer warning requirement under California's Proposition 65 is not 'specific' enough to trigger preemption because it is 'not the kind[ ] of requirement[ ] that Congress and the FDA feared would impede the ability of federal regulators to implement and enforce specific federal requirements.'" (*Ibid.*)

Following both *Medtronic* and *Stratton*, the "predicate duty" analysis for preemption does not apply when both the federal and state statutes require a general warning for a variety of products and do not target specific products. As noted above, Proposition 65 is a general statute which applies to all products and services posing a health risk. Similarly, the FHSA is a general statute which requires warnings on labels for substances it determines are hazardous. (15 U.S.C. § 1261.) A "'hazardous substance'" includes: "Any substance or mixture of substances which (i) is

---

[10] Proposition 65 imposes consumer warning requirements for dental amalgam because it contained dental mercury.

[11] The two component parts of dental amalgam — dental mercury and amalgam alloy — are separately regulated by the MDA; therefore, the court concluded the MDA covered dental amalgam. (*Stratton*, *supra*, 92 F.3d 807, 810.)

toxic, (ii) is corrosive, (iii) is an irritant, (iv) is a strong sensitizer, (v) is flammable or combustible, or (vi) generates pressure through decomposition, heat, or other means, if such substance or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children." (15 U.S.C. § 1261(f)(1)(A).)

Given the generality of Proposition 65 and the FHSA, Cotter's criticism of *Allenby* for failing to consider the statutes' predicate duty has no merit. Unlike the Smoking Act in *Cipollone*, which provided requirements for a particular product and specified the exact wording for the warning, the requirements of the FHSA apply to a variety of products in numerous industries. In this situation an analysis of the predicate duty becomes meaningless.

***(ii) Allenby correctly found point of sale signs are not labels***

*Allenby's* analysis of labels under the FHSA does not contradict the reasoning in either *Cipollone* or *Medtronic*.[12] Our independent examination of Proposition 65 and the FHSA confirms *Allenby's* finding on point of sale signs and the FHSA.

As with any state law regulating health and safety, we begin by presuming Proposition 65 is not displaced. (*Medtronic*, *supra*, — U.S. —, —, 116 S.Ct. 2240, 2248.) Since the FHSA does have a specific preemption clause, we need to determine "the domain expressly pre-empted." (*Cipollone*, *supra*, 505 U.S. 504, 517, 112 S.Ct. 2608, 2618.) We determine this "domain" by examining the language of the preemption statute, its "'statutory framework,'" and the "structure and purpose of the statute as a whole" (*Medtronic*, *supra*, — U.S. at p. —, 116 S.Ct. at p. 2251).

As already stressed, Congress enacted an explicit preemption provision in the FHSA prohibiting a state to establish a cautionary labeling requirement for hazardous substances covered by the FHSA "unless such cautionary labeling requirement is identical to the labeling requirement" in this Act. (15 U.S.C. § 1261 note.)

---

[12] We express no opinion about *Allenby's* finding that FIFRA did not preempt Proposition 65 warnings.

The Act defines label as a "display of written, printed, or graphic matter upon the immediate container of any substance ... and (2) on all accompanying literature where there are directions for use, written or otherwise." (15 U.S.C. § 1261(n).)

Congress chose to restrict the definition of a label to include accompanying literature only when that material contains "directions for use." (15 U.S.C. § 1261(n).) These words indicate the warning must tell the user how to use the product. This situation resembles the one in *Medtronic, supra*, where the court refused to interpret "requirement" in the preemption provision of the MDA to mean "remedy" because "if Congress intended to preclude all common-law causes of action, it chose a singularly odd word with which to do it." (*Medtronic, supra*, — U.S. —, — - —, 116 S.Ct. 2240, 2251- 2252.) Similarly, if Congress wanted preemption under the FHSA to apply to all accompanying literature with "implied" directions for use, as Cotter argues, Congress could have specified that.

In addition to examining the language of the FHSA, we must consider Congress's stated purpose. The FHSA itself does not contain a section setting forth its purpose but Congress enacted the FHSA in 1960 to "'provide nationally uniform requirements for adequate cautionary labeling of packages of hazardous substances which are sold in interstate commerce and are intended or suitable for household use.'" (*Moss* v. *Parks Corp.* (4th Cir.1993) 985 F.2d 736, 739, *citing* House Com. on Interstate and Foreign Commerce, Federal Hazardous Substances Labeling Act, H.R. Rep. No. 1861, 86th Cong., 2d Sess. 2 (1960), *reprinted in* 1960 U.S. Code Cong. & Admin. News, No. 2, p. 2833.) When Congress amended the FHSA in 1966, the legislative history discussed the impracticality of having the states produce potentially 50 different labels for a particular hazardous substance. (*Jenkins* v. *James B. Day & Co.* (1994) 69 Ohio St.3d 541, 545, 634 N.E. 2d 998, 1001-1002.)

To assess Congress's purpose we must also consider the structure and framework of the FHSA. Following *Medtronic, supra*, — U.S. —, —, 116 S.Ct. 2240, 2250, we must interpret the words in the preemption statute narrowly when the federal statute and state statute have general applicability.

As already stressed, the FHSA is an extremely broad statute. It applies to numerous products in a variety of industries and it does not require specific language on the labels but "merely requires (1) that labels contain the signal word 'WARNING' or 'CAUTION' and (2) words which describe the potential hazard." (*Allenby*, *supra*, 958 F.2d 941, 950.) Furthermore, the generality of these requirements makes it clear the federal government has not "weighed the competing interests relevant" to the particular hazardous material and has not "reached an unambiguous conclusion about how those competing considerations should be resolved in a particular case or set of cases, and implemented that conclusion via a specific mandate on manufacturers or producers" (*Medtronic*, *supra*, --- U.S. ----, ----, 116 S.Ct. 2240, 2258).

Given the FHSA's general applicability, point of sale signs are unlikely to interfere with the federal government's objectives. Point of sale signs obviously do not require manufacturers to develop more than one label for all 50 states. Moreover, point of sale signs allow the state to regulate sales, a distinctively state interest, without imposing additional labeling requirements on packages. Rather than conflicting with the federal government's objectives, they serve to further the purpose of the FHSA by providing a larger audience with information.

Interpreting Proposition 65's warnings as "implied" direction for use to the consumer to take "steps" to "reduce exposure," as Cotter argues, would create an extensive preemption provision under the FHSA. With such a definition, purely informational signs could be considered implied directions for use. For example, signs merely rating material on the product's appropriateness for minors or adults would constitute labeling. Indeed, price tags could be found to be implied directions for use as one should use expensive items sparingly.

We, therefore, conclude *Allenby* correctly found the FHSA does not preempt Proposition 65 point of sale signs.[13]

---

[13] The People also argue the FHSA does not preempt Proposition 65 because the state and federal statute warn against different risks. The People contend Proposition 65 addresses harm to the developing fetus (Cal. Code Regs., tit. 22, § 12601, subd. (b)), while the FHSA relates to

### 3. Distinguishing FIFRA cases

To support its argument of preemption, Cotter cites numerous FIFRA cases which found FIFRA preempted common law claims based on inadequate point of sale warnings.[14] (*Taylor AG Industries* v. *Pure-Gro* (9th Cir.1995) 54 F.3d 555, 560 (*Taylor AG*); *Louisiana-Pacific Corp.* v. *Koppers Co.* (1995) 32 Cal. App. 4th 599, 38 Cal. Rptr. 2d 257; *Papas* v. *Upjohn Co.* (11th Cir. 1993) 985 F.2d 516.) Although the preemption provision in FIFRA is essentially identical to the one in the FHSA,[15] that similarity should not obfuscate the differences between the statutes.

Three material differences distinguish FIFRA cases from this case: (1) FIFRA defines a label more expansively than the FHSA; (2) FIFRA is not simply a labeling statute while the FHSA is; and (3) FIFRA cases are predominantly tort common law cases and this is a Proposition 65 enforcement action.

---

the risks of chemical pneumonitis, pneumonia, and pulmonary edema caused by aspiration into the lungs and systemic injury from inhaling the vapor. This argument has no merit because, as Cotter asserts, the FHSA includes reproductive toxicity within the meaning of "toxic" (16 C.F.R., § 1500.3(c)(2)(ii)(C) (1996)).

[14] Cotter points out *Burke* v. *Dow Chemical Co.* (E.D.N.Y. 1992) 797 F. SUPP. 1128, 1140 (Burke ) represents the sole post-*Cipollone* case holding FIFRA does not preempt warnings outside of product labeling. The People contend Burke correctly applied the "channels of communication" language contained in *Cipollone*. The court in *Cipollone* stated that even if one channel of communication was preempted, other "channels of communication" were not. (*Cipollone*, *supra*, 505 U.S. 504, 528, 112 S.Ct. 2608, 2623.) The court, however, was referring to obligations outside of advertising or the promotion of cigarettes and the statement does not clarify whether labeling includes point of sale signs. Since we find the preemption question under FIFRA and the FHSA to be different, we do not address Burke's interpretation of the court's use of "channels of communication."

[15] FIFRA's preemption clause provides as follows: "Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." (7 U.S.C. § 136v(b).)

*(i) Differences between the statutes*

FIFRA broadly defines label as the following: "The term 'labeling' means all labels and all other written, printed, or graphic matter — [¶] (A) accompanying the pesticide or device at any time; or [¶] (B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications...." (7 U.S.C. § 136(p)(2).) Congress designated matter "accompanying" the product as a label without any further qualification. Consequently, FIFRA cases do not help us determine Congress's intent when it limited a label under the FHSA to mean accompanying literature providing "directions for use."

More significantly, when examining the "statutory framework" of FIFRA, the differences between the two federal statutes are magnified. Rather than creating a mere labeling statute, Congress in 1972, "transformed it [FIFRA] into a comprehensive regulatory statute governing the use and sale of pesticides." (*Louisiana-Pacific Corp.* v. *Koppers Co.*, *supra*, 32 Cal. App. 4th 599, 603, 38 Cal. Rptr. 2d 257.) One of the cases emphasized by Cotter, *Taylor AG*, *supra*, 54 F.3d 555, 560, noted the "rigorous label-approval process under FIFRA." The court explained: "Although FIFRA does not prescribe the exact contents of labels, manufacturers are not free, ... to create pesticide labels in any manner they choose. Rather, ... the EPA approves each label only after a careful review of the product data and the draft label." (*Ibid.*)

Given the statutory framework of FIFRA, a broad interpretation of the word "label" under FIFRA is consistent with *Medtronic*. Not only does FIFRA define "label" expansively, but it represents a situation "in which the Federal Government has weighed the competing interests relevant to the particular requirement in question, reached an unambiguous conclusion about how those competing considerations should be resolved in a particular case or set of cases, and implemented that conclusion via a specific mandate on manufacturers or producers" (*Medtronic*, *supra*, — U.S. —, —, 116 S.Ct. 2240, 2258).

In contrast, as already stressed, the FHSA does not (1) have a label approval process, (2) specify the wording to be used on the label, or (3) regulate the sale or use of the hazardous products

covered by the federal statute. Instead, as the People contend, Congress has left the states free to regulate the sale and use of these hazardous products. The FHSA has remained a labeling statute and the scope of its preemption differs significantly from FIFRA.[16] Accordingly, cases interpreting FIFRA have "limited relevance" to determinations of preemption and the FHSA. (*See Jenkins* v. *James B. Day & Co.*, *supra*, 634 N.E. 2d 998, 1004, fn. 4.)[17]

***(ii) Differences between tort actions and state enforcement actions***

An additional reason for contending the FIFRA cases cited by Cotter are irrelevant, according to the People, is because they involve tort claims rather than the state's enforcement of a statute. In response, Cotter claims FIFRA tort cases provide an appropriate method of analysis for federal preemption under the FHSA since the basis for requiring a warning under common law and Proposition 65 is the same. Cotter argues "[w]here the reason is the same, the rule should be the same" (Civ. Code, § 3511), and "[t]he law respects form less than substance" (Civ. Code, § 3528).

As Cotter asserts, enforcement and common law actions pose the same questions and issues in a determination of the "domain expressly preempted." Accordingly, we used *Cipollone* and *Medtronic*, actions in tort, to determine the scope of preemption under the FHSA.

---

[16] To the extent *Allenby*, *supra*, 958 F.2d 941, 945 held the issue of preemption arising under FIFRA is identical to that under the FHSA, we disagree. We do agree with *Allenby's* conclusion that the preemption provisions in both statutes are essentially identical.

[17] "Because the FHSA requires no federal agency approval of the precise language which appears on the label of a substance covered by the FHSA, it appears that an inadequate warning claim is more readily preempted for a product covered by FIFRA than would a similar inadequate warning claim be for a product covered by the FHSA. Of course, since this case does not involve FIFRA, we do not resolve this question. We discuss FIFRA merely to explain why cases interpreting that statute may be of limited relevance to the issue in this case." (*Jenkins* v. *James B. Day & Co.*, *supra*, 634 N.E. 2d 998, 1004, fn. 4.)

After determining the preempted domain, the analyses of tort and enforcement actions diverge in a materially significant respect. Once the court determines a common law claim falls within the reach of the preemption clause, the analysis ceases. The federal government's interest in promoting interstate commerce always trumps the individual's interests in receiving damages.

Unlike a tort action, an enforcement action requires the court to establish whether any method of compliance with the state statute falls outside the scope of the preemption provision. (See *Stratton*, *supra*, 92 F.3d 807, 810.) If any method is beyond the reach of the preemption provision, the statute remains valid. The federal statute sets the standards for sufficient warnings (barring any tort claims on this basis), but does not necessarily prohibit the state from requiring warnings consistent with the preemption provision that regulate the use and sale of these products.

Both *Allenby*, *supra*, 958 F.2d 941, 948 and *Taylor AG*, *supra*, 54 F.3d 555, 560 acknowledged this distinction when discussing preemption and FIFRA. The Ninth Circuit in *Taylor AG*, *supra*, rejected the argument "that liability should be imposed upon the Manufacturers for failure to warn arising from alleged deficiencies in advertisements, point-of-sale warnings, and other materials distributed in connections with a sale." (54 F.3d at p. 561, fn. omitted.) The court in *Taylor AG* reconciled its holding with the one in *Allenby* by explaining the court in *Allenby* "merely" held "non-label warnings were not preempted by FIFRA," but *Allenby* admitted "'[t]he argument against product liability suits for inadequate labeling is strong.'" (*Taylor AG*, *supra*, at p. 561, fn. 2, quoting *Allenby*, *supra*, at p. 948.)

Cotter claims the two Ninth Circuit cases, *Allenby* and *Taylor AG*, are inconsistent, with the latter representing the better law. However, as both the People and the court in *Taylor AG* point out, the two courts were simply addressing different types of actions.[18]

---

[18] Dicta in *Taylor AG* suggested the court agreed point of sale signs, even under the broad definition of label in FIFRA, did not constitute labeling. The court stated Allenby did not address "whether common law damages could be imposed for the absence of these non-label [point of sale signs] warnings." (*Taylor AG*, *supra*, 54 F.3d 555, 561, fn. 2, italics

In finding Proposition 65 is not preempted under the FHSA, because point of sale signs are not labels and do not provide "directions for use," we are not opening the door to common law tort claims premised on the inadequacy of the product label.

Finally, Cotter claims tort actions and enforcement actions are the same because a company must pay a penalty when it violates the statute. The penalty, Cotter claims, has the same consequences as an award for damages. This argument, however, ignores the vital distinction between the two. As the People point out, an enforcement action never requires the court to assess the adequacy of the label, while that is the task facing the court in a tort action. In an enforcement action, the court simply looks to see whether the company has complied with the mandate of the statute.

***4. The CPSC's interpretation of "label" under the FHSA is clearly erroneous***

Cotter contends the court in *Allenby* erred by ignoring the CPSC's conclusion that point of sale signs qualify as a "direction for use." In response to a request from the Chemical Specialties Manufacturers Association for an advisory opinion, Clement D. Earhardt, III, from the Office of General Counsel of the CPSC concluded on March 6, 1991, the following: "A warning that a product can cause cancer or birth defects is not an express direction for use. Nevertheless, it conveys the information that, in using the product, steps should be taken to minimize or eliminate exposure. Stated another way, the warning itself can also serve as a direction for use." (Advisory Opn. No. 312, p. 3.) The opinion continued: "Therefore, although the warning quoted in your inquiry does not necessarily convey specific actions to be taken in the use of the product, it does convey information about how the product should be used (steps should be taken to reduce exposure). Accordingly, this office views the statement as a direction for use. It follows, therefore, that signs and the like bearing such warnings are 'accompanying literature containing directions for use' and thus are labeling under FHSA § 2(n)."[19] (*Id.* at p. 4.)

---

added.) Thus, it identified point of sale signs as "non-label[s]."

[19] Cotter requests this court to take judicial notice of a letter from

The People respond that the defendant in *Allenby* presented this argument and, rather than ignoring it, the court clearly rejected it. Furthermore, the People contend Advisory Opinion Number 312 is not a long-standing administrative application of the statute and is litigation- inspired because it responds to a request during litigation from defense counsel in *Allenby*. Litigation-inspired opinions have no authority (*Bowen* v. *Georgetown University Hospital* (1988) 488 U.S. 204, 212, 109 S.Ct. 468, 473-474, 102 L.Ed.2d 493), but generally courts have applied this rule only when the administrative agency is a party to the litigation.

The People also claim letters from the general counsel state the March 6, 1991, advisory opinion "did not express a direct opinion on preemption...."[20] Therefore, according to the People, the letter from general counsel is not entitled to deference.

The People's final argument against deferring to the CPSC's advisory opinion is the opinion's interpretation contravenes the language of the statute and regulations. We agree with this assertion and, for the reasons explained fully above, we find the CPSC's interpretation is "'plainly erroneous'" and entitled to no deference. (*Stinson* v. *U.S.* (1993) 508 U.S. 36, 45-46, 113 S.Ct. 1913, 1919, 123 L.Ed.2d 598; *Dix* v. *Superior Court* (1991) 53 Cal. 3d 442, 460, 279 Cal. Rptr. 834, 807 P.2d 1063).

For the foregoing reasons we find point of sale signs pursuant to Proposition 65 do not constitute "directions for use" and are not preempted by the FHSA. We now turn to Cotter's claim of de facto labeling.

---

CPSC General Counsel Eric A. Rubel dated October 17, 1995, stating Advisory Opinion No. 312 has never been modified, revoked, suspended, or superseded. We grant judicial notice of this letter.

[20] We grant the People's request for judicial notice of letters and other documents from the file of the general counsel of the CPSC. One such letter states "[t]he Commission has not formulated a general view of preemption [of Proposition 65] beyond the express preemption provisions in its various statutes." (Letter dated July 3, 1995, from the general counsel for the CPSC to counsel for Cotter.)

### *II. Proposition 65 Is Not a De Facto Labeling Statute*

Even if point of sale signs are not labels, Cotter argues Proposition 65 can only be implemented by placing labels on a package; therefore, in practice, it is a labeling statute and preempted by the FHSA. Since the question of de facto labeling raises an issue of law and material fact, we independently review the evidence submitted to determine whether it raises a triable issue of material fact. (*Schrader* v. *Scott*, *supra*, 8 Cal. App. 4th 1679, 1684, 11 Cal. Rptr. 2d 433.)

To establish a de facto labeling statute, Cotter must show it can only satisfy the requirements of Proposition 65 by using labels. (*Stratton*, *supra*, 92 F.3d 807, 810 [to find preemption a party must show all possible methods of complying with Proposition 65 conflict with the FHSA].) Cotter cannot establish de facto labeling merely by demonstrating it is difficult or costly to comply. Rather, it must show using point of sale signs is a "physical impossibility." (*See Allenby*, *supra*, 958 F.2d 941, 948- 949 ["[F]or purposes of preemption analysis," the party arguing preemption must show "a physical impossibility of complying" with both Proposition 65 and the federal statute "before succeeding on a claim that Proposition 65 is preempted on this theory."].)

Cotter cites almost no legal authority to support its contention of de facto labeling, but claims point of sale signs cannot be used because they are ineffective and too expensive to implement. Cotter's evidence of "physical impossibility" amounts to little more than submitting a number of conclusions, declarations, and opinions. Interestingly, Cotter fails to explain why, if point of sale signs are so costly and ineffective in communicating a message, manufacturers continue to use them to advertise their goods.

Cotter first argues the warnings required by Proposition 65 "must be reasonably calculated, considering the alternative methods available under the circumstances, to make the warning message available to the individual prior to exposure." (Cal. Code Regs., tit. 22, § 12601, subd. (a).) Point of sale signs, he argues, are less effective than product labels in warning consumers. To support this claim he cites a footnote in *King* v. *E.I. Du Pont De Nemours & Co.*, (D. Me. 1992) 806 F. SUPP. 1030, 1037, fn. 4, which was later affirmed in an opinion minus the footnote in *King* v. *E.I.*

*DuPont De Nemours and Co.*, (1st Cir.1993) 996 F.2d 1346. The footnote merely stated "[w]e can see no more effective way to warn potential users of the dangers of a product than by product labels." (*King* v. *E.I. Du Pont De Nemours & Co.*, *supra*, 806 F. SUPP. at p. 1037, fn. 4.) This statement does not establish the ineffectiveness of point of sale signs.

In addition to failing to demonstrate ineffectiveness, Cotter's argument is seriously flawed because a manufacturer does not have to use the best warning method to comply with Proposition 65. The court in *Ingredient Communication Council, Inc.* v. *Lungren* (1992) 2 Cal. App. 4th 1480, 1494, 4 Cal. Rptr. 2d 216 (ICC) confirmed Proposition 65 does not require a manufacturer to use the "'best'" or most effective method, but merely demands a "reasonable" method. Both the court in *ICC*, *supra*, 2 Cal. App. 4th 1480, 1486, 4 Cal. Rptr. 2d 216 and the safe harbor language set forth in the California Code of Regulations (tit. 22 § 12601, subd. (b)(1)(B)) approve of point of sale signs as a reasonable method.[21]

Cotter also claims a manufacturer cannot ensure a retailer will properly post the signs without incurring unacceptable costs to implement the program.[22] In support of this argument, Cotter stated it sent signs to its California members on March 1988 and

---

[21] Cotter argues any method other than labeling would not meet the "reasonableness" test of *ICC*, *supra*, 2 Cal. App. 4th at p. 1494, 4 Cal. Rptr. 2d 216. The "reasonableness" test requires the trial court to examine the warning's efficacy and cost before determining whether the warning satisfies Proposition 65. The "reasonableness" test set forth in *ICC*, however, does not apply to point of sale signs. The court in *ICC* limited the "test" to situations in which the trial court had to determine whether "alternative warning methods" — that is, methods outside of the safe harbor warnings — provided a reasonable warning. (*Ibid.*)

[22] Attorneys for the National Paint and Coatings Association (NPCA) filed an amici curiae brief on behalf of Cotter's *de facto* labeling argument. Much of the data on the costs associated with point of sale signs is irrelevant to Cotter's inability to use these signs and outside the record.

January 1990. Moreover, in January 1994, it sent signs again[23] and directed the members to place both signs "close to each of your own paint factory's products." Cotter also submitted deposition testimony of several retailers explaining the problems they had complying with the manufacturer's requests for them to post point of sale warnings.

To counter Cotter's argument, AYS identified numerous paint and/or adhesive manufacturers' complying with Proposition 65 warning signs. Many of True Value Hardware stores did not follow instructions, the People contend, because Cotter did not adequately explain the proper placement of the signs.[24] The People claim once the retailers received explicit instruction about the appropriate location pursuant to the Permanent Injunction, the majority of those deposed testified they understood the directions and properly complied.[25]

In their final argument, the People maintain Cotter cannot argue de facto labeling because it did not attempt to follow the mandate in *ICC*. The court in *ICC* stated a manufacturer must adjust the warning system in light of operational experience and new facts when attempting to comply with Proposition 65. (*ICC*, *supra*, 2 Cal. App. 4th 1480, 1493, 4 Cal. Rptr. 2d 216.) AYS notified Cotter on December 10, 1992, that its stores were not providing

---

[23] AYS, an intervener in this action, claims many of these signs did not comply with Proposition 65.

[24] The People contend the directions did not tell retailers to post the signs in front of or next to the spray paints. For example, directions sent January 27, 1992, merely stated: "Signs # 1 and # 2 enclosed should be displayed close to each of your own Paint factory's products."

[25] Cotter insists some retailers did not comply even after being given proper information, establishing manufacturers cannot compel retailers to follow their orders. Cotter, however, misconstrues its burden of proof. It must show it cannot comply and, since most retailers did adhere to Cotter's instructions when given the proper information, compliance seems physically possible. As the People point out, Cotter can use a variety of techniques and incentives to encourage acquiescence among the remainder of the retailers.

warnings for their products containing toluene and Cotter should have taken appropriate steps to remedy the problem. Cotter, the People claim, can exercise a certain level of control over the True Value stores because members of the cooperative must agree to observe Cotter's bylaws, policies, and procedures.[26]

We find the trial court did not err in finding "Proposition 65 does not impose a de facto labeling requirement on Cotter & Company." Cotter has not established the physical impossibility of meeting Proposition 65 warning requirements with point of sale signs. Cotter may ultimately choose to use a label which complies with both Proposition 65 and the FHSA; however, choosing to use a label does not negate the viability of point of sale signs.

## CONCLUSION

The warning requirements of Proposition 65 may be satisfied by point of sale signs which are not "directions for use" or labels under the FHSA. The FHSA, therefore, does not preempt Proposition 65. Additionally, Cotter has failed to prove it cannot use point of sale signs and has not established it cannot use point of sale signs to satisfy Proposition 65 warning requirements. Accordingly, we affirm.

KLINE, P.J., and HAERLE, J., concur.

---

[26] The People claim Cotter could take additional steps to ensure acquiescence. After an action involving Cotter and improper Proposition 65 warnings for methylene chloride paint strippers, the manufacturer remedied the situation by (1) providing clear directions to the stores for the placement of the signs and (2) requiring each store to return a postcard indicating it had properly posted the warning sign. Cotter followed up with phone calls to those stores not returning the postcard.

**APPENDIX B**

First Appellate District, Division Two, No. A070904

S061311

IN THE SUPREME COURT OF CALIFORNIA

---

THE PEOPLE, Respondent [FILED

v. July 9, 1997]

COTTER & COMPANY, Appellant

---

Appellant's petition for review DENIED.

GEORGE

Chief Justice

## APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA ex. rrl. DANIEL E. LUNGREN, Attorney General of the State of California, | ) | No. 952433 (and consolidated matters 954568, 954993, 957067) |
| Plaintiffs, | ) | |
| v. | ) | ORDER RE SUMMARY ADJUDICATION |
| THE SHERWIN-WILLIAMS COMPANY, DUPLI-COLOR PRODUCTS COMPANY, | ) | |
| Defendants, | ) | [filed Mar. 9, 1995] |
| and consolidated matters | ) | |

This matter came on for hearing on February 23, 1995 at 2:00 P.M. in Department 8, the Honorable Stuart R. Pollak presiding. Present were Edward Weil and Susan Fiering, Deputy Attorneys General, for the People of the State of California ("People"), Jeffrey Margulies, Esq. for Cotter & Company ("Cotter"), and Cliff Chanler, Esq. and Syda Kosofky, Esq. for As You Sow.

After full consideration of the evidence, and the separate statements submitted by each party and the authorities submitted by counsel, as well as oral argument by counsel, the Court finds there is no triable issue of material fact as to the Fifth Affirmative Defense asserted in the Answer of Cotter & Company and that summary judgment should be denied to Cotter & Company and a summary adjudication granted to the People. The Court finds that pursuant to the decision of the Ninth Circuit in Chemical Specialties Manufacturers Ass'n. Inc. v. Allenby, 958 F.2d 941 (9th Cir. 1992), Proposition 65 warnings do not constitute cautionary

labeling preempted by the Federal Hazardous Substances Act ("FHSA") as a matter of law.

The Court further finds that, based on the undisputed facts in the record before the Court, Proposition 65 does not impose a de facto labeling requirement on Cotter & Company. The disputes in the record as to the People's facts numbers 25 and 67 and to Cotter's facts numbers 6, 7, 10, 13, 20 and 21 and any dispute as to Cotter's Additional Material Fact in Dispute Number 1 are not genuine and/or are not material to this determination. The remaining undisputed facts stated by the People and Cotter establish that Cotter is not required to provide a warning on the label of its products in order to comply with Proposition 65. Therefore, Proposition 65 does not present a de facto labeling requirement that is preempted by FHSA.

IT IS THEREFORE ORDERED that Cotter's motion for summary judgment is DENIED and the People's motion for summary adjudication of Cotter & Company's Fifth Affirmative Defense is GRANTED and that the final judgment in this action shall, in addition to any other matters determined at trial, award judgment in accordance with the matters so adjudicated.

Dated: 3/9/95

STUART R. POLLAK
JUDGE OF THE SUPERIOR COURT

## APPENDIX D

DANIEL E. LUNGREN, Attorney General
of the State of California
THEODORA BERGER, State Bar No. 050108
Assistant Deputy Attorney General
EDWARD G. WEIL, State Bar No. 88302
SUSAN S. FIERING, State Bar No. 121621
Deputy Attorney General
2101 Webster Street, 12th Floor
Oakland, CA 94612-3049
Telephone: (510) 286-3892
Fax No.: (510) 286-4020

Attorneys for People of the State of California

[Filed June 9, 1995]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN FRANCISCO

| | |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA ex rel. DANIEL E. LUNGREN, Attorney General of the State of California, | ) Case Nos. 952433, 954568, 954993, 957067 |
| Plaintiffs, | ) CONSENT JUDGMENT |
| v. | ) |
| SHERWIN WILLIAMS COMPANY, et al., | ) |
| Defendants. | ) |
| AND CONSOLIDATED MATTERS | ) |

1. **INTRODUCTION**

1.0 On September 17, 1993 the People of the State of California ex rel. Daniel E. Lungren ("People"), filed a Complaint for Civil Penalty and Injunctive Relief ("Complaint") in San Francisco County Superior Court, Case No. 954993 against Cotter

& Company ("Cotter) and other defendants. The People's Complaint alleges that Cotter violated provisions of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code sections 25249.5 et seq. ("Proposition 65"), and Business and Professions Code sections 17200 et seq. ("Unfair Competition Act"), by knowingly exposing persons to toluene, a chemical known to the State of California to cause birth defects or other reproductive harm, without first providing a clear and reasonable warning to such individuals.

1.1 Cotter is a corporation that employs more than ten persons and manufactures, distributes and sells within the State of California certain paint products and adhesives that contain toluene, a chemical which the State of California placed on its list of chemicals "known to cause reproductive toxicity" pursuant to Health and Safety Code section 25249.9 on January 1, 1991, and thus have been subject to Proposition 65 warning requirements since January 1, 1992. The products covered by this Consent Judgment ("Covered Products") are listed in Exhibits A, B and C hereto.

1.2 Cotter contends that it has complied with consumer product warning requirements under Proposition 65 as it applies to the Covered Products. The People, by their Complaint, contend that Cotter has not taken adequate actions to comply with Proposition 65 as it applies to the Covered Products.

1.3 For purposes of this Consent Judgment the parties stipulate that this Court has jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction over Cotter as to the acts alleged in the Complaint, that venue is proper in the County of San Francisco and that this Court has jurisdiction to enter this Consent Judgment as a resolution of the allegations contained in the Complaint.

1.4 The parties enter into this Consent Judgment pursuant to a settlement of disputed claims between the parties for the purpose of avoiding prolonged litigation and to insure that the requirements of Proposition 65 are expeditiously carried out. By execution of this Consent Judgment, Cotter does not admit any violations of Proposition 65, the Unfair Competition Act, or any related statutes. Nothing in this Consent Judgment shall be

construed as an admission by Cotter of any fact, issue of law, or violation of law. Nor shall compliance with this Consent Judgment constitute or be construed as an admission by Cotter of any fact, issue of law, or violation of law. However, this paragraph shall not diminish or otherwise affect the obligations, responsibilities, and duties of Cotter under this Consent Judgment.

2. **SETTLEMENT PAYMENT**

2.0 Except as provided in paragraph 2.2 below, within thirty (30) days from the date this Consent Judgment is fully executed by the parties and entered by the Court, Cotter shall pay the sum of $275,000 in settlement of the disputed claims referred to herein with respect to the Covered Products. The money shall be paid as follows:

a. a civil penalty of $155,000 pursuant to Health & Safety Code sections 25249.7(b) and 25192;

b. the sum of $10,000 as a donation to the California Public Health Foundation (CPHF), a tax exempt, charitable corporation organized under the laws of California, for deposit into CPHF's Environmental Health Account, to be used for environmental health activities related to the enforcement of Proposition 65 by the Attorney General, as shall be agreed upon between CPHF and the Attorney General;

c. the sum of $10,000 representing reasonable costs and attorneys fees incurred by the State of California in investigating this matter, prosecuting this action and negotiating this Consent Judgment.

d. the sum of $100,000 to the California Public Health Foundation ("CPHF") as restitution pursuant to the Unfair Competition Act to be used at the discretion of the CPHF either for the "Curriculum Design and Training for Household Hazardous Waste Programs" or the "Professional Education Opportunities for Pediatricians, Public Health Nurses, Home Health Aides Regarding Household Toxics."

2.1 Payment of the amounts specified in paragraph 2.0 a and c above shall be made to the Attorney General of the State of California, 2101 Webster St., 12th Floor, Oakland, CA 94612.

The payments shall note that the payments are made in connection with a settlement of the action and shall be sent to the attention of Deputy Attorney General Susan S. Fiering. Payment of the amounts specified in paragraph 2.0 b above shall be made by delivery of the required amount to CPHF, 2001 Addison Street, Suite 210, Berkeley, California, 94704-1103, attention James B. Simpson, General Counsel. A copy of any payments sent to the CPHF shall be sent to Deputy Attorney General Susan S. Fiering at the address above. Payment of the amounts specified in paragraph 2.0 d shall be made by delivery of the required amount to CPHF at the address above. The payment shall be designated as for the Cotter restitution projects. A copy of any payments shall be sent to Deputy Attorney General Susan S. Fiering at the address above.

3. **INJUNCTIVE RELIEF — CLEAR AND REASONABLE WARNING**

3.0 The Covered Products listed in Exhibit A hereto are subject to a permanent injunction entered by this Court on July 23, 1994 as modified on September 20, 1994. The Covered Products listed in Exhibits B and C hereto ("Covered Products B" and "Covered Products C") were not covered by that injunction and will therefore be subject to the injunctive relief stated herein. The parties hereby agree that the pendency of any appeal by Cotter from the Court's Summary Adjudication Order as set forth in paragraph 5.0 shall not affect or stay Cotter's duty to comply with the terms of the July 23, 1994 Permanent Injunction and September 20, 1994 modification or with the injunctive relief set forth herein.

3.1 As long as any of the Covered Products B continue to contain toluene, Defendant shall provide a clear and reasonable warning under the circumstances and in the manner described in paragraph 3.2 to 3.7 below, that the Covered Product contains a chemical known to the State of California to cause birth defects or other reproductive harm.

3.2 By September 1, 1995, Defendant shall itself take the following actions or shall insure that the manufacturer of the Covered Products B takes the following actions:

- at the point of manufacture, or prior to shipment to California or distribution within California, affix to or print on the product container, cap, label, unit package, or (where the product is too small to receive a warning directly on the container) on the display of such Covered Products that are intended for sale in California the following warning:

> WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm

- Such warning shall be prominently affixed to or printed on each Covered Product B with such conspicuousness, as compared with other words, statements, designs, or devices on the label as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use. The warning shall be at least the same size as the largest of any other safety warnings on the product container and the word "warning" shall be in all capital letters and in bold print. If printed on the label itself the warning shall be contained in the same section of the label that states other safety warnings concerning the use of the product. The Attorney General agrees to review any labeling proposed to be used under this section and advise Defendant as to whether he believes such labeling to comply with this section.

3.3 After September 1, 1995, Defendant shall not ship or cause to be shipped into California for sale in the state and shall not distribute to member retailers for sale in California any such Covered Products B that do not have the warning described in paragraph 3.2 above affixed to or printed on their product container, cap, label, unit package or (where the product is too small to receive a warning directly on the container) on their product display.

3.4 The requirement for product labeling, set forth in paragraphs 3.2 to 3.3 above is imposed pursuant to the terms of this stipulation. The parties recognize that product labeling is not the exclusive method of providing a warning under Proposition 65 and its implementing regulations.

3.5 By June 15, 1995, Defendant shall take the following steps or shall insure that the manufacturer of the Covered B Products takes the following steps:

- send by first class mail a "Proposition 65 Warning Letter," in a form approved by the Attorney General, and the specified enclosures, to the owner or manager for each of Defendant's member retailers.

- After June 15, 1995, send the Proposition 65 Warning Letter and specified enclosures to any new member retailer prior to shipment of any of the Covered Products to such new member retailer.

3.6 The Member Proposition 65 Warning Letter shall contain as enclosures two (2) warning signs printed on 65-pound stock in a size and format to be approved by the Attorney General, to be displayed in front of or next to the Covered Products B so that the warning is visible to the consumer and will be understood to apply only to the affected products. The letter shall also contain as an enclosure a postcard in a form approved by the Attorney General instructing the recipient to sign and return the card to indicate that he/she has received the material and will comply with Proposition 65 by providing the appropriate warnings.

3.7 In the event that the Defendant or the manufacturer does not receive the signed return postcard within twenty days of mailing, Defendant shall cease shipping any Covered Products B to the member retailer until (a) the member retailer subsequently returns the signed postcard to defendant or the manufacturer or (b) the Covered Products B have a Proposition 65 warning affixed to the label or container as set forth in paragraph 3.3 above.

3.8 Until such time as all Covered Products B are labeled pursuant to paragraph 3.2 above, any time a Cotter service representative visits a member retailer, he or she shall take steps to observe whether the member retailer has properly posted the warning signs in front of or next to the Covered Products B so that the warning is visible to the consumer and will be understood to apply only to the Covered Products B. In the event that the service representative determines that the warning signs are not properly posted, he shall post the signs himself and Defendant shall cease

shipping Covered Products B to the member retailer until (a) the member retailer agrees in writing to continue to post the warning signs or (b) the Covered Products B are labeled pursuant to paragraph 3.2 above.

3.9 For the products listed in Exhibit C hereto ("Covered Products C"), the parties agree that the manufacturers of those products have represented and submitted documentation to the Attorney General demonstrating that the products either no longer contain toluene as an intended ingredient or that the containers are labeled with a clear and reasonable warning pursuant to Proposition 65. Based on this representation and the evidence submitted, the Attorney General agrees that these actions constitute compliance with Proposition 65 as to the Covered Products C at this time. In the event that the manufacturers of Covered Products C fail to provide a Proposition 65 warning for Covered Products C as required by law, nothing in this Consent Decree shall diminish or otherwise affect the obligations, responsibilities and duties of Cotter to provide a warning pursuant to Proposition 65.

## 4. ENTRY OF CONSENT JUDGMENT

4.0 The parties hereby request that the Court promptly enter this Consent Judgment. Provided the Court enters the Consent Judgment, Cotter and People waive their respective rights to a hearing or trial on the allegations of the Complaint except as provided in paragraph 5.

## 5. APPEAL

5.0 Cotter and the People hereby agree that Cotter shall have no right to appeal from any aspect of this Consent Judgment except that Cotter shall retain the right to appeal from this Consent Judgment only on the grounds that the Court's Summary Adjudication Order denying Cotter's Motion for Summary Judgment and granting the people's Motion for Summary Adjudication on Cotter's Fifth Affirmative Defense, and ruling that Proposition 65 is not preempted by the provisions of the Federal Hazardous Substances Act ("Summary Adjudication Order"), was in error. The parties agree that this is a controlling issue of law in this matter and that determination by the Court of Appeal is appropriate. The parties further agree that if Cotter appeals from

the Court's Summary Adjudication Order, Cotter's duty to comply with this Judgment shall, in all respects, including but not limited to, the payment of prejudgment interest, be the same as with an appeal from a judgment entered after trial, except that, the pendency of the appeal shall not relieve Cotter of its obligations to comply with the terms of the July 23, 1994 Permanent Injunction and the September 20, 1994 modification and with the injunctive relief set forth in paragraph 3.0 herein.

## 5. MATTERS COVERED BY THIS CONSENT JUDGMENT

5.0 This Consent Judgment constitutes a full and final settlement as to Cotter, its officers, directors, employees, agents and representatives, with respect to all claims, violations, actions, causes of action, damages, penalties, costs or attorneys' fees incurred by the Attorney General's Office, based on alleged violations of Section 25249.6 of Proposition 65 and the Unfair Competition Act, Business and Professions Code Sections 17200 et seq. and any other claim, up to and including the date of execution of this Consent Judgment, brought on behalf of the general public, arising from the failure to provide clear, reasonable, and lawful warnings of exposure to toluene from Covered Products listed in Exhibits A, B and C hereto. This Consent Judgment constitutes a full and final settlement of all such alleged violations, whether committed by Cotter or by an entity within its chain of distribution, including, but not limited to retail sellers of the Covered Products, except that the Consent Judgment does not resolve any alleged violations by manufacturers of any of the products listed in Exhibits B and C hereto.

5.1 Nothing in this Consent Judgment resolves any claim by As You Sow against Cotter for attorneys fees and/or costs pursuant to Code of Civil Procedure section 1021.5.

## 6. ADDITIONAL ENFORCEMENT ACTIONS: CONTINUING OBLIGATIONS

6.0 The People do not waive any right to take further enforcement actions on any new or additional violations not covered by this Consent Judgment.

## 7. INCORPORATION OF STIPULATION, SETTLEMENT AGREEMENT AND ORDER AND PERMANENT INJUNCTION INTO CONSENT JUDGMENT

7.0 The Stipulation, Settlement Agreement and Order entered by the Court on November 7, 1994 (copy attached hereto as Exhibit D) is hereby incorporated fully into this Consent Judgment.

7.1 The Permanent Injunction, entered by this Court on July 23, 1994 and the modification entered on September 20, 1994, (copies attached hereto as Exhibit E) are hereby incorporated fully into this Consent Judgment.

## 8. ENFORCEMENT OF JUDGMENT

8.0 The terms of this Consent Judgment shall be enforced exclusively by the the People and by Cotter. The parties may, by noticed motion or order to show cause before the Superior Court of San Francisco County, giving the notice required by law, enforce the terms and conditions contained herein. In any action brought by the People to enforce this Consent Judgment, the People may seek whatever fines, costs, penalties or remedies as may be provided by law for any violation of the Consent Judgment. Any violation of the terms of the Consent Judgment that also violate Proposition 65 or the Unfair Competition Act or any other laws may subject Cotter to civil penalties under those statutes to be sought in a separate civil action.

## 9. MODIFICATION OF JUDGMENT

9.0 This Consent Judgment may be modified only upon written agreement of the parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as provided by law and upon entry of a modified Consent Judgment by the Court. Any modification of the Stipulation, Settlement Agreement and Order entered by the Court on November 7, 1994 (Exhibit D) shall be as provided in that document.

## 10. AUTHORITY TO STIPULATE

10.0 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the party he or she represents to enter

into this Consent Judgment and to execute it on behalf of the party represented and legally to bind that party.

11. **RETENTION OF JURISDICTION**

11.0 This Court shall retain jurisdiction of this matter to implement the Consent Judgment.

12. **ENTIRE AGREEMENT**

12.0 This Consent Judgment contains the sole and entire agreement and understanding of the parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitment and understandings related hereto. No representations, oral or otherwise, express or implied, other than those contained herein have been made by any party hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the parties.

13. **GOVERNING LAW**

13.0 The validity, construction and performance of this Consent Judgment shall be governed by the laws of the State of California.

IT IS SO STIPULATED:

DATED: May 16, 1995

HAIGHT, BROWN & BONESTEEL

By: /s/
JEFFREY J. MARGULIES
Attorneys for Defendant
Cotter & Company

DATED: May 19, 1995

DANIEL E. LUNGREN, Attorney General of the State of California
THEODORA BERGER
Assistant Attorney General
EDWARD G. WEIL
SUSAN S. FIERING
Deputy Attorneys General

By: /s/
SUSAN S. FIERING
Attorneys for the People of the
State of California

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: June 9, 1995

Stuart R. Pollak
JUDGE OF THE SUPERIOR COURT

## APPENDIX E

### 15 U.S.C. § 1261 note

(b)(1)(A) Except as provided in paragraphs (2) and (3), if a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) [15 U.S.C. §§ 1261(p), 1262b)] designed to protect against a risk of illness or injury associated with the substance, no State or political subdivision of a State may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under section 2(p) or 3(b).

* * * * *

(2) The Federal Government and the government of any State or political subdivision of a State may establish and continue in effect a requirement applicable to a hazardous substance for its own use (or to the packaging of such a substance) which requirement is designed to protect against a risk of illness or injury associated with such substance and which is not identical to a requirement described in paragraph (1) applicable to such substance (or packaging) and designed to protect against the same risk of illness or injury if the Federal, State, or political subdivision requirement provides a higher degree of protection from such risk of illness or injury than the requirement described in paragraph (1).

(3)(A) Upon application of a State or political subdivision of a State, the Commission may, by regulation promulgated in accordance with subparagraph (B),exempt from paragraph (1), under such conditions as may be prescribed in such regulation, any requirement of such State or political subdivision designed to protect against a risk of illness or injury associated with a hazardous substance if —

(i) compliance with the requirement would not cause the hazardous substance (or its packaging) to be in violation of the applicable requirement described in paragraph (1), and

(ii) the State or political subdivision requirement (I) provides a significantly higher degree of protection from such risk of illness or injury than the requirement described in paragraph (1), and (II) does not unduly burden interstate commerce.

In determining the burden, if any, of a State or political subdivision requirement on interstate commerce the Commission shall consider and make appropriate (as determined by the Commission in its discretion) findings on the technological and economic feasibility of complying with such requirement, the cost of complying with such requirement, the geographic distribution of the substance to which the requirement would apply, the probability of other States or political subdivisions applying for an exemption under this paragraph for a similar requirement, and the need for a national, uniform requirement under this Act [this chapter] for such substance (or its packaging).

(B) A regulation under subparagraph (A) granting an exemption for a requirement of a State or political subdivision of a State may be promulgated by the Commission only after it has provided, in accordance with section 553(b) of title 5, United States Code [section 553(b) of Title 5, Government Organization and Employees], notice with respect to the promulgation of the regulation and has provided opportunity for the oral presentation of views respecting its promulgation.

* * * * *

**15 U.S.C. § 1261(n)**

The term "label" means a display of written, printed, or graphic matter upon the immediate container of any substance or, in the case of an article which is unpackaged or is not packaged in an immediate container intended or suitable for delivery to the ultimate consumer, a display of such matter directly upon the article involved or upon a tag or other suitable material affixed thereto; and a requirement made by or under authority of this chapter that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears (1) on the outside container or

wrapper, if any there be, unless it is easily legible through the outside container or wrapper and (2) on all accompanying literature where there are directions for use, written or otherwise.

**15 U.S.C. § 1261(p)**

The term "misbranded hazardous substance" means a hazardous substance * * * intended, or packaged in a form suitable, for use in the houshold or by children, if the packaging or labeling of such substance is in violation of an applicable regulation issued pursuant to section 1472 or 1473 of this title or if such substance, except as otherwise provided by or pursuant to section 1262 of this title, fails to bear a label —

(1) which states conspicuously (A) the name and place of business of the manufacturer, packer, distributor or seller; (B) the common or usual name or the chemical name (if there be no common or usual name) of the hazardous substance or of each component which contributes substantially to its hazard, unless the Commission by regulation permits or requires the use of a recognized generic name; (C) the signal word "DANGER" on substances which are extremely flammable, corrosive, or highly toxic; (D) the signal word "WARNING" or "CAUTION" on all other hazardous substances; (E) an affirmative statement of the principal hazard or hazards, such as "Flammable", "Combustible", "Vapor Harmful", "Causes Burns", "Absorbed Through Skin", or similar wording descriptive of the hazard; (F) precautionary measures describing the action to be followed or avoided, except when modified by regulation of the Commission pursuant to section 1262 of this title; (G) instruction, when necessary or appropriate, for first-aid treatment; (H) the word "poison" for any hazardous substance which is defined as "highly toxic" by subsection (h) of this section; (I) instructions for handling and storage of packages which require special care in handling or storage; and (J) the statement (i) "Keep out of the reach of children" or its practical equivalent, or (ii) if the article is intended for use by children and is not a banned hazardous substance, adequate directions for the protection of children from the hazard, and

(2) on which any statements required under subparagraph (1) of this paragraph are located prominently and are in the English language in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the label.

**16 C.F.R. § 1500.3(c)(9)**

In the definition of "label" in section 2(n) of the act [15 U.S.C. § 1261(n)] * * * , a provision stipulates that words, statements, or other information required to be on the label must also appear on all accompanying literature where there are directions for use, written or otherwise. To make this provision more specific, "accompanying literature" is interpreted to mean any placard, pamphlet, booklet, book, sign, or other written, printed, or other graphic matter or visual device that provides directions for use, written or otherwise, and that is used in connection with the display, sale, demonstration, or merchandising of a hazardous substance intended for or packaged in a form suitable for use in the household or by children.

**16 C.F.R. § 1500.14**

**Products requiring special labeling under section 3(b) of the act.**

(a) Human experience, as reported in the scientific literature and to the Poison Control Centers and the National Clearing House for Poison Control Centers, and opinions of informed medical experts establish that the following substances are hazardous:

* * * * *

(3) Products containing * * * 10 percent or more by weight of toluene (also known as toluol) * * * .

* * * * *

(b) The Commission finds that the following substances present special hazards and that, for these substances, the labeling required

by section 2(p)(1) of the act is not adequate for the protection of the public health. Under section 3(b) of the act, the following specific label statements are deemed necessary to supplement the labeling required by section 2(p)(1) of the act:

* * * * *

(3) *Benzene, toluene, xylene, petroleum distillates.* * * *

(ii) Because products containing 10 percent or more by weight of toluene, xylene, or any other substances listed in paragraph (a)(3) of this section may be aspirated into the lungs, with resulting chemical pneumonitis, pneumonia, and pulmonary edema, such products shall be labeled with the signal word "danger," the statement or [sic] hazard "Harmful or fatal if swallowed," and the statement "Call physician immediately."

(iii) Because inhalation of the vapor of products containing 10 percent or more by weight of toluene or xylene may cause systemic injury, such products shall bear the statement of hazard "Vapor harmful" in addition to the statements prescribed in paragraph (b)(3)(ii) of this section.

**Cal. Health & Safety Code**
**§ 25249.6 (1992 & 1997 Supp.)**

**Required warning before exposure to chemicals known to cause cancer or reproductive toxicity**

No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual * * * .

## Cal. Health & Safety Code § 25249.11 (1992 & 1997 Supp.)

**Definitions**
For purposes of this chapter:

* * * * *

(f) "Warning" within the meaning of Section 25249.6 need not be provided separately to each exposed individual and may be provided by general methods such as labels on consumer products, inclusion of notices in mailings to water customers, posting of notices, placing notices in public news media, and the like, provided that the warning accomplished is clear and reasonable. In order to minimize the burden on retail sellers of consumer products, including foods, regulations implementing Section 25249.6 shall to the extent practicable place the obligation to provide any warning materials such as labels on the producer or packager rather than on the retail seller, except where the retail seller itself is responsible for introducing a chemical known to the state to cause cancer or reproductive toxicity into the consumer product in question.

## Cal. Code Reg., tit. 22, § 12601

**Clear and Reasonable Warnings.**

* * * * *

(b) Warnings for consumer products exposures which include the methods of transmission and the warning messages as specified by this subdivision shall be deemed to be clear and reasonable. A "consumer products exposure" is an exposure which results from a person's acquisition, purchase, storage, consumption, or other reasonably forseeable use of a consumer good, or any exposure that results from receiving a consumer service.

(1) The warning may be provided by using one or more of the following methods singly or in combination:

(A) A warning that appears on the product's label or other labeling. The term "label" means a display of written, printed, or graphic matter upon a product or its immediate container. The term "labeling" means any label or other written, printed or graphic matter affixed to or accompanying a products or its container or wrapper.

(B) Identification of the product at the retail outlet in a manner which provides a warning. Identification may be through shelf labeling, signs, menus, or a combination thereof.

* * * * *

(3) The warnings provided pursuant to paragraphs (1)(A) and (1)(B) shall be prominently placed upon a product's label or other labeling or displayed at the retail outlet with such conspicuousness, as compared with other words, statements, designs, or devices in the label, labelign or display as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use.

(4) The warning message must include the following language:

* * * * *

(B) For consumer products that contain a chemical known to the state to cause reproductive toxicity:
"WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm."